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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 291

PIERCE OLIVER KIDD BREWER, ROBERT A. BURCH AND ROBERT M. BURCH, *Appellants*

v.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

STATEMENT AS TO JURISDICTION

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INDEX

Page

OPINION BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 6

STATEMENT OF CASE 7

THE QUESTIONS ARE SUBSTANTIAL 13

CONCLUSION 29

APPENDICES

A. Opinion of the Supreme Court of North Carolina A-1—A-39

B. Judgment of the Supreme Court of North Carolina B-41

C. Notice of Appeal to the Supreme Court of ~~North Carolina~~ THE UNITED STATES ..... C-43—C-48

D. Order Staying Execution ..... D-49—D-50

E. North Carolina General Statute 14-353 ..... E-51

F. Motion and Order Extending Time to File, Rule 13 F-53—F-54

CITATION OF AUTHORITIES

STATUTES:

Title 28, U.S.C., Section 1257(2) 3, 4, 13, 28

Connecticut—General Statutes of Connecticut, Section 53-256 18

Louisiana—Revised Statutes of Louisiana, 14:73 18

Massachusetts—Annotated Laws of Massachusetts, Chapter 271, Section 39 18

Michigan—Compiled Laws of Michigan, Chapter 750, Section 125 18

Page

Nebraska—Revised Statutes of Nebraska, Section 28-710 18

New Jersey—Revised Statutes of New Jersey, 2:114-11 18

New York—Penal Code, Section 439 .....18, 19, 22

North Carolina—General Statutes, 14-353 ....2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 27, 28

Session Laws of 1913, Chapter 190 .....14, 17

Pennsylvania—Purdon's Pennsylvania Statutes, Title 18, Section 4667 .....18, 24

Rhode Island—Title 11, Chapter 7, Section 3-4 18

South Carolina—Code of Laws of South Carolina, Section 16-570 18

Virginia—Code of Virginia, Title 18, Section 366..15, 18, 24

Wisconsin—Wisconsin Statutes, Chapter 134.05 18

CONSTITUTIONAL PROVISIONS:

N. C. Constitution, Article I, Section 17 .....3, 6, 11, 12

14th Amendment, U. S. Constitution 3, 6, 7, 11, 12, 13, 18, 23

Article I, Section 10, U.S. Constitution 23

CASES CITED:

Beard v. City of Alexandria, 341 U.S. 622, 71 S. Ct. 920, 95 L. ed. 1233 4

Bosselman v. U. S. (CCA), 239 F. 82, 86 15

Bowie v. West Jefferson, 231 N.C. 408 24

Boyce Motor Lines v. United States, 342 U.S. 337, 72 S. Ct. 329, 96 L. ed. 367 20

Chicago R. I. & P. R. Co. v. Perry, 259 U.S. 548, 48 S. Ct. 524, 66 L. ed. 1056 5

Connally v. General Construction Company, 269 U.S. 385, 46 S. Ct. 126 20

Page

Grebe v. State, 112 Neb. 715, 201 N.W. 143 15
Harding v. Illinois, 196 U.S. 78, 25 S. Ct. 176, 49 L. ed. 394 4
Holmes v. State Board of Finance, 69 N.M. 430 27
Kahalley v. State, 48 So. 2d 794 25
Lanzetta v. New Jersey, 306 U.S. 451 21
Lovell v. City of Griffin, Ga., 303 U.S. 444, 58 S. Ct. 66, 82 L. ed. 949 4
Miller v. Schoene, 276 U.S. 272, 48 S. Ct. 246, 72 L. ed. 568 5
New York, New Haven & Hartford Railroad Co. v. New York, 165 U.S. 628, 41 L. ed. 853, 17 S. Ct. 418 4
Nickey v. Mississippi, 292 U.S. 393, 54 S. Ct. 743, 78 L. ed. 1323 5
Pierce v. United States, 314 U.S. 306, 87 L. ed. 226 27
People v. Davis, 160 N.Y.S. 769 .....23, 24
People of New York ex rel. Bryant Zimmermon, 278 U.S. 63, 49 S. Ct. 61, 73 L. ed. 184 5
Standard Oil Co. v. Johnson, 316 U.S. 481, 62 S. Ct. 1168, 86 L. ed. 1611 5
State v. Brewer, 258 N.C. 534, 129 S.E. 2d 262 .....2, 12
State v. Diamond, 27 N.M. 477 25
State v. Prince, 52 N.M. 15 .....26, 27
United States v. Cardiff, 344 U.S. 174, 97 L. ed. 200 21
United States v. De Cadena, 105 F. Supp. 202 27
Whitfield v. Ohio, 297 U.S. 431, 56 S. Ct. 432, 80 L. ed. 778 5
Winters v. New York, 333 U.S. 507, 68 S. Ct. 665, 92 L. ed. 568 .....5, 21

OTHER AUTHORITIES CITED:

American Jurisprudence, Criminal Law, Volume 14, Sec. 19 27

Black's Law Dictionary, 3rd Ed. 15

McGehee, Due Process of Law, p. 82 24

University of Pennsylvania Law Review, Volume 108, page 852 19

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v.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

STATEMENT AS TO JURISDICTION

This is an appeal by the appellants from a final judgment of the Supreme Court of North Carolina, which judgment was entered on February 2, 1963. The judgment entered by the Supreme Court of North Carolina affirmed a prior judgment of the Superior Court of Wake County, State of North Carolina, which judgment was entered on July 18, 1962. The judgment of the Superior Court is not officially reported.

The appellants submit this Statement as to Jurisdiction to show to the Supreme Court of the United States that the Court has jurisdiction and that the questions brought forward for decision are substantial.

The opinion and judgment of the Supreme Court of North Carolina, from which the appellants gave apt notice of appeal, is reported in 258 N.C. 534 and 129 S.E. 2d 262. The judgment of the Superior Court of Wake County, State of North Carolina, is not officially reported, but such judgment has been brought forward in the record docketed in the Supreme Court of the United States.

JURISDICTION

This appeal by the appellants brings before the Court for its review a criminal action which was commenced by a bill of indictment returned by a grand jury of Wake County, North Carolina, in April of 1962.

The indictment, which consumes some thirty-five (35) pages of the State record, charges in twelve separate counts that the appellants conspired to violate and did by various acts thereafter violate a penal statute of North Carolina. to wit: North Carolina General Statute 14-353.

North Carolina General Statute 14-353 is a statute which purports to make it a misdemeanor for any person to give, offer or promise any gift or gratuity to any agent, servant or employee with the intent of influencing him in respect to his employer's business. Also, the statute makes it a misdemeanor for an agent, servant or employee to accept any gift or gratuity with the understanding that he will act in a peculiar way with respect to the employer's business. The full text of the act is set out in Appendix B of this Statement and will be more thoroughly discussed hereinafter.

The appellants were convicted of certain counts in the bill of indictment and were sentenced. They appealed to the Supreme Court of North Carolina. On February 2,

1963, the Supreme Court of North Carolina, by its opinion and judgment, affirmed the conviction of the appellants. On April 30, 1963, the appellants gave notice of appeal to the Supreme Court of the United States under the provisions of Title 28 United States Code, Section 1257(2), which provides for an appeal to the Supreme Court of the United States, "... where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

At the outset of this case, and before any plea was entered by the appellants, they filed timely motions to quash the bill of indictment, setting forth as one of their reasons that the statute (G.S. 14-353) under which the indictment is drawn is repugnant to Amendment XIV of the Constitution of the United States. The State Record, as certified to this Court, contains the written motion to quash and includes those portions of the motion pertaining to the State and Federal Constitutions.

Following the pronouncement of judgment by the lower court, the appellants made a timely motion in arrest of judgment on the grounds that the statute, North Carolina General Statute 14-353, violated the State and Federal Constitutions. Such motions were made in writing and appear in the State Record, pages 53, 55 and 56.

Upon appeal to the Supreme Court of North Carolina, the appellants again made a motion in arrest of judgment, basing the motion, in part, upon the ground that the statute violated the Constitutions of North Carolina and the United States.

The Supreme Court, in its opinion, specifically passed upon the validity of General Statute 14-353 as against the appellants' contentions that it violated and is repugnant to Article I, § 17 of the Constitution of North Carolina and Amendment XIV of the Constitution of the United States. The Court devoted a significant portion of its opinion to

such contentions. This portion of the opinion appears in State Record, pages 75 through 86, and also Appendix A of this Statement at pages A-15 through A-28.

From the very outset of this case, from the return of the bill of indictment to the arguments in the Supreme Court of North Carolina, the appellants have consistently and meticulously insisted that the statute, as drawn, is repugnant to the Constitutions, both State and Federal.

In their appeal to the Supreme Court of North Carolina, the appellants, in accordance with the appellate rules of the Supreme Court of North Carolina, brought forward for review their exceptions and assignments of error based upon constitutional grounds. The assignments of error pertaining thereto are found in State Record, pages 57, 58, 60, 61, 62, 63 and 64.

The appellants' brief argued each of these assignments of error at length and the oral argument in the Supreme Court of North Carolina, in main part, was devoted to the constitutional question.

The Supreme Court of North Carolina upheld the validity of General Statute 14-353 against appellants' contentions that it is unconstitutional. Appellants contend that this brings the case squarely within the appeals contemplated by Title 28 United States Code, Section 1257(2).

As authority for this Court's jurisdiction on appeal, the following cases are cited:

New York, New Haven & Hartford Railroad Co. v. *New York,* 165 U.S. 628, 41 L. ed. 853, 17 S. Ct. 418;

Harding v. *Illinois,* 196 U.S. 78, 25 S. Ct. 176, 49 L. ed. 394;

Beard v. *City of Alexandria,* 341 U.S. 622, 71 S. Ct. 920, 95 L. ed. 1233;

Lovell v. *City of Griffin, Ga.,* 303 U.S. 444, 58 S. Ct. 66, 82 L. ed. 949;

Chicago R. I. & P.R. Co. v. *Perry*, 259 U.S. 548, 48 S. Ct. 524, 66 L. ed. 1056;

Winters v. *New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. ed. 568;

Standard Oil Co. v. *Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 86 L. ed. 1611;

Miller v. *Schoene*, 276 U.S. 272, 48 S. Ct. 246, 72 L. ed. 568;

Nickey v. *Mississippi*, 292 U.S. 393, 54 S. Ct. 743, 78 L. ed. 1323;

Whitfield v. *Ohio*, 297 U.S. 431, 56 S. Ct. 432, 80 L. ed. 778;

People of New York ex rel Bryant Zimmermon, 278 U.S. 63, 49 S. Ct. 61, 73 L. ed. 184;

The statute involved in this case is a penal statute of the State of North Carolina. The official citation of the statute is Chapter 14, Section 353 of the General Statutes of North Carolina (G.S. 14-353).

The full text of the statute reads as follows (the italicized portions are pertinent):

"§ 14-353. INFLUENCING AGENTS AND SERVANTS IN VIOLATING DUTIES OWED EMPLOYERS.—*Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business;* any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal,

employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1913, c. 190, s. 1; C. S., s. 4475.)"

QUESTIONS PRESENTED

The Supreme Court of North Carolina, in its opinion and judgment entered on February 2, 1963, held, among other things, that the provisions of General Statute 14-353 did not violate Article I, Section 17 of the State Constitution. That particular section of the State Constitution is known as the "law of the land clause." It is, by State decision, analogous to the Due Process Clause of the Federal Constitution, Amendment XIV.

The Court below also ruled that the statute (G.S. 14-353) did not violate and was not repugnant to Amendment XIV of the Federal Constitution.

The appellants consistently challenged the statute (G.S. 14-353) on the grounds that the language employed thereby is so vague and indefinite that men of reasonable intelligence cannot by reading it determine what course of conduct is prohibited thereby with reasonable certainty. Likewise, the appellants contended that the statute sets forth no immutable standard of guilt and that it, by its terms, is so broad and sweeping that it is an arbitrary and capricious exercise of the police powers of the State.

The Court below, in affirming the judgment of the lower court, thus ruled that the statute proscribes the prohibited conduct with sufficient certainty and that the statute, as written, was properly within the exercise of the police power of the State.

Each and every challenge of the appellants insisting that the statute was repugnant to the State and Federal Constitutions was rejected by the Court.

It is in the light of the foregoing decision, opinion and judgment that the appellants present the following questions for review by this Court:

1. Whether North Carolina General Statute 14-353, as written, is violative of and repugnant to the due process clause of the Constitution of the United States, Amendment XIV, in that the language employed in the statute is so vague, indefinite and uncertain that reasonable men, including the appellants, cannot by reading the same know what course of conduct is prohibited thereby, and whether the statute, as written, meets the standards and requirements of due process in defining the persons who come within its scope?

2. Whether North Carolina 14-353, as it is written, is repugnant to the Fourteenth Amendment of the Constitution of the United States in that the statute, when read and interpreted as written, constitutes an arbitrary and capricious exercise of the police power of the State in that the act condemns as criminal acts which are, in fact, innocent, along with those acts conceded to be criminal in nature?

STATEMENT OF CASE

A. The appeal filed herein by the appellants is from a final judgment of the Supreme Court of North Carolina entered on February 2, 1963. The matter on this appeal originated before a grand jury in the Superior Court of Wake County, North Carolina. The bill of indictment was returned in the April 1962 Criminal Term of Wake County Superior Court. A copy of the bill of indictment appears in State Record, page 4 through 30.

The indictment, covering some thirty (30) pages of the Record, charges a violation of a penal statute of North

Carolina, to wit: General Statute 14-353. The full text of the statute is set out above at page E-51 of this Statement of Jurisdiction.

The exact chronology of events following the bill of indictment on April of 1962 is as follows:

1. On April 25, 1962, before the entry of any plea, the lower court, at a day fixed for the hearing of motions, entertained the appellants' motion to quash. The motion to quash was in written form and appears in State Record, pages 32, through 42.

2. On April 25, 1962, the lower court denied the appellants' motion to quash as to each and every ground presented therein. The appellants each took exception to the ruling of the lower court and subsequently, upon appeal to the Supreme Court of North Carolina, made assignments of error based upon the failure of the Court to grant the motion to quash. State Record, pages 57 through 62.

3. On June 4, 1962, the action, which is the subject matter of this appeal, came on for trial in the lower court, the Superior Court of North Carolina. The appellants then entered a plea of not guilty, whereupon a jury was duly empaneled to try the cause. The plea of the appellants appears in State Record, pages 42 and 43.

4. On July 17, 1962, after the State had rested its case, the appellants made orally in open court, motions for nonsuit. These were denied. The appellants offered no evidence and renewed their motion for nonsuit. The lower Court allowed these motions for nonsuit as to the corporate defendants and as to the defendants, George Masefield, Martin J. Hamilton and Walter Schoenfeldt. The court allowed the appellants' motions for nonsuit as to counts 2, 3 and 4 of the bill of indictment. State Record, page 31. The appellants Pierce Oliver Kidd Brewer and Robert A. Burch were found guilty of Counts 1, 5, 6, 7, 8, 9, 10 and 11 of the bill of indictment. They were found not guilty of Count 12 of the bill of indictment. State Record, pages

44 and 45. The appellant Robert M. Burch was found not guilty of Counts 1, 5, 6 and 12 of the bill of indictment, but guilty of Counts 7, 8, 9, 10 and 11. State Record, pages 45 and 46.

5. On July 18, 1962, the appellants, made written motions to set aside the verdict, which motions were wholly denied by the trial court.

6. On July 18, 1962, the appellants filed with the trial court written motions to set aside the judgment. The motion in arrest of judgment of the appellant Brewer appears at State Record, pages 53 and 54. The motion in arrest of judgment as to the appellant Robert A. Burch appears at State Record, pages 55 and 56. The motion in arrest of judgment of the appellant Robert M. Burch appears at State Record, pages 56 and 57. The trial court denied the said motions in full and the appellants excepted and subsequently assigned such as error as will appear at State Record, pages 58, 61 and 63.

7. On July 18, 1962, the trial court passed sentence on the appellants, sentencing the appellants Brewer and Robert A. Burch to eighteen months in prison on each count of which they were found guilty. The trial court sentenced the appellant Robert M. Burch to twelve months in prison on each count of which he was found guilty, but suspended sentence on condition that he pay a fine of twenty five hundred dollars ($2,500.00) and the entire costs of the trial.

8. On July 19, 1962, the appellants gave notice of appeal to the Supreme Court of North Carolina. The appellants Brewer and Robert A. Burch set forth four distinct assignments of error for review by the Supreme Court of North Carolina. Under these four assignments of error were grouped twelve exceptions. State Record, pages 57 through 63.

The appellant Robert M. Burch set forth four assignments of error, under which were grouped seven exceptions, as will appear at State Record, pages 63 and 64.

9. On February 2, 1963, the Supreme Court of North Carolina entered its judgment and opinion affirming in full the judgment of the trial court. A copy of the opinion and judgment is attached hereto as appendix A and also appears in the Record, pages 66 through 93.

10. On April 30, 1963, the appellants gave notice of appeal to the Supreme Court of North Carolina. Record pages 52 and 53.

11. By order dated the 25th day of June, 1963, the Chief Justice of the Supreme Court of North Carolina granted to the appellants until July 20, 1963 to docket the Record and this Statement in the Supreme Court of the United States.

B. How the Federal Question Is Presented

The appellants, at the earliest possible stage of this action, raised the Federal questions which are brought forward for review by the Supreme Court of the United States. This was done before arraignment or entry of plea on April 25, 1962, by motions to quash. These motions are set out in full in State Record, pages 32, through 42.

Pertinent to this appeal are only those parts of the motions to quash which pertain to the Federal questions. The appellants, in their motions to quash, repeated the constitutional grounds as to each count of the bill of indictment. Therefore, for the purpose of this appeal, it is deemed sufficient to set forth the grounds as to the Federal question only as to the first count of the bill of indictment. That portion of the motion to quash reads as follows (State Record, page 33):

> "(4) The first count (of the bill of indictment) should be quashed in that the statute, G.S. 14-353, under which the indictment is laid, is void, unconstitutional and

> repugnant to the due process clause and the law of the land clause of the Constitution of the United States and the State of North Carolina, Amendment XIV and Article I, Section 17, respectively, in that the language used therein is so vague, indefinite and uncertain that the public in general, including these defendants, cannot determine what course of conduct is condemned thereby; that the statute fixes no immutable standard of guilt, and does not inform the public in general, including these defendants, of the nature and cause of the accusation against them; that the statute further constitutes an arbitrary, unreasonable and capricious exercise of the police powers of the State."

The trial court denied the appellants' motion to quash and each took an exception to the ruling, including the ruling as to the constitutional grounds. Subsequently, and upon appeal to the Supreme Court of North Carolina, the appellants assigned as error the failure of the trial court to quash the indictment on constitutional grounds. (State Record, pages 55, 57, 58, 59, 60, 61, 63 and 64.)

At the end of the trial, and after the pronouncement of judgment, the appellants, by filing written motions in arrest of judgment, renewed their insistence that G.S. 14-353 is repugnant to the Federal constitution, and moved the trial court to arrest the judgment. The pertinent portion of the motion in arrest of judgment appears at page 59, State Record, and is set out below:

> "1. The indictment, and each count thereunder is laid and founded upon a statute, General Statute 14-353, which statute is unconstitutional, void and repugnant to the due process clause of the Constitution of the United States, Amendment 14, and to the law of the land clause of the Constitution of North Carolina, Article I, Section 17, in that the language employed by the statute is so vague, indefinite and uncertain that the public in general, including this defendant in bill of indictment #7679, cannot know what course of conduct is condemned thereby; that the statute fixes no immutable standard of guilt, and does not inform the

public in general, including this defendant, of the nature and cause of the accusations against him; that the statute further constitutes an arbitrary, unreasonable and capricious exercise of the police powers of the State."

The trial court denied the appellants' motions in arrest of judgment, including that part of the motion raising the constitutional question. The appellants excepted and upon appeal to the Supreme Court of North Carolina assigned as error the failure of the trial court to arrest the judgment. State Record, pages 58, 61 and 63.

In the Supreme Court of North Carolina, upon the argument of this action, the appellants renewed their motions in arrest of judgment.

The Supreme Court of North Carolina, in affirming the judgment of the trial court, refused the appellants' motions in arrest of judgment and held that General Statute 14-353 is not in conflict either with Article I, Section 17, of the Constitution of North Carolina nor with Amendment XIV of the Constitution of the United States. See *State* v. *Pierce Oliver Kidd Brewer, Robert A. Burch, Robert M. Burch, George Masefield, Martin J. Hamilton, Walter Schoenfeldt, Pfaff and Kendall*, a corporation, *Traffic and Street Sign Company*, a corporation, 258 N.C. 534. Appendix A of this Statement.

Relative to the appellants' assignments of error, based upon Amendment XIV of the Constitution of the United States, the Supreme Court of North Carolina devoted several pages of its opinion in holding the statute valid. The gist of the Court's opinion as to the constitutional question is summed up as follows (Appendix A, page A-27 of this Statement):

"In our opinion, and we so hold, the first two parts of G.S. § 14-353, which the indictment charges the defendants violated, are not repugnant to the 'due process clause' of section one of the 14th Amendment

of the United States Constitution, and to 'the law of the land' clause of Article I, Section 17, of the North Carolina Constitution, and are a reasonable and proper exercise of the police power of the State."

The judgment and opinion of the North Carolina Supreme Court were entered on February 2, 1963.

On the 30th day of April, 1963, and within the time and manner provided by Title 28 U.S.C., Section 1257(2) and Rule 10 of the Revised Rules of the Supreme Court of the United States, appellants filed their Notice of Appeal in the office of the Clerk of the Supreme Court of North Carolina, setting out therein the particular constitutional questions to be brought forward for review. Appellants' Notice of Appeal to this Court and their Certificate of Service of Notice of Appeal are reproduced in the Appendices of this Statement as Appendix C.

ARGUMENT

THE QUESTIONS ARE SUBSTANTIAL

The questions presented here are twofold; both deal with Amendment XIV of the Constitution of the United States. No other questions are presented, and the entire matter narrows itself as to whether North Carolina General Statute 14-353, when tested in the light of due process requirements, brings itself within the pale of Amendment XIV. The appellants contend that it does not, and offer for consideration the following argument.

The two questions stated above in general language may be stated more specifically as follows:

The real question here is this:

1. *May a penal statute make criminal acts which are generally conceded to be innocent, and are in fact innocent, as well as acts generally recognized to be criminal, by omitting the necessary distinction of corrupt intent?* (Emphasis Added)

The act on which the indictments are based (General Statutes of North Carolina, Section 14-353,) attempts to define four separate offenses as follows:

(1) Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business;

(2) Any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business;

(3) Any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receive, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor;

(4) And any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1913, c. 190, s. 1; C. S., s. 4475.)

All counts in the bill of indictment appear to be based on parts (1) and (2) of the Act.

The Statute omits the words "corruptly," or "with intent to influence his action *in a manner detrimental to his master's business*"; or "to the prejudice of his master's business." (Emphasis Added)

Also, it omits such words as "without the knowledge and consent of the master."

These omissions are made more obvious by reference to the pertinent Virginia statute, which says:

> "Title 18, Section 336, *Corruptly Influencing or Being Influenced as Agent, Etc.* (1) Any person who gives, offers or promises to any agent, employee or servant any gift or gratuity whatever *without the knowledge and consent of the principal, employer or master* of such agent, employee or servant, with intent to influence his action *to the prejudice* of his principal's employer's or master's business; . . . (shall be guilty)" (Emphasis Added)

In the interest of brevity, we will not attempt to quote from the pertinent statutes of all 12 of the states listed herein. However, it should be noted with emphasis that the statutes of *each* and *every* one of these states contain some form of language which goes farther than North Carolina G. S. 14-353 in informing a reasonable man of the standard of guilt established thereby. The statutes of Connecticut, Wisconsin, South Carolina, Rhode Island, and Massachusetts each employ the word "*corruptly*" in a manner similar to this: "Any person who corruptly gives, offers . . ." The use of the word "corruptly" would seem to provide the definiteness and certainty required of a penal statute, because, as stated in *Black's Law Dictionary*, 3rd Ed., "When used in a statute, this term generally imparts a wrongful design to acquire some pecuniary or other advantage. *Grebe* v. *State*, 112 Neb. 715, 201 NW, 143, 144; *Bosselman* v. *U. S.* (CCA) 239 F. 82, 86."

The statutes of each of the six remaining states, Michigan, Pennsylvania, New Jersey, Nebraska, New York, Louisiana, employ language which would exempt gifts given with the knowledge and consent of the employer from the scope of the statute.

Only the North Carolina statute, G. S. 14-353, is bare of any of these distinguishing elements. The North Carolina statute stands alone in its use of broad, vague, uncertain

and sweeping language. Only the North Carolina statute would condemn any gift given to any employee by any person with any intent whatever to influence the employee in his employer's business whether good or bad.

It is noteworthy that in the codification of the North Carolina statutes the caption of this statute has been changed to read: "*Influencing agents and servants in violating duties owed employers.*" The words added in the caption: "*violating duties owed employers,*" recognize the deficiencies of the act, and if they were included in the text might supply the necessary distinction of corrupt intent. But this was not done.

When a penal statute condemns and makes criminal those acts and things which are thought to be innocent, and are in fact innocent, as well as those acts generally recognized as criminal, it is arbitrary in nature and invalid. It is the vice of vagueness which has the double effect of making the statute arbitrary.

Granted that the statute (G.S. 14-353) would prohibit the conduct alleged to have been committed by the appellants in the voluminous bill of indictment; it does so because of its omnibus structure. The statute puts out a dragnet which catches in its condemnation innocent and innocuous acts as well as those which are thought to be clearly criminal in nature. It is a catchall statute prohibiting a host of things in general terms. For instance, we think the North Carolina act clearly prohibits the innocent and customary act of tipping. Without giving the statute a strained or hypothetical interpretation, the language employed therein brings within its purview those persons who tip their favorite waitress or favorite barber. The tipper clearly intends for his tipping to influence the employee. The tip is given for preferential treatment. Numerous other examples could be given which would fall within the pale of prohibited conduct. Many practices, customary to the business and commercial intercourse are

made criminal under the statute. Thrown into doubt is the practice of taking a business associate to dine for the purpose of discussing business, or taking him to his club, or for a game of golf. The salesman who, calling on the manager of a business, casually offers to purchase him a soft beverage or coffee, would do so at the peril of committing a crime. All social amenities attendant to the business world are thrown into doubt. This is the effect of the North Carolina statute, and, indeed, reasonable men are compelled to speculate at their peril as to whether they have stepped over the line of condemned conduct.

The statute in question (G.S. 14-353) was enacted by the General Assembly of North Carolina in 1913. The original citation of the statute is Chapter 190 of the Session Laws of 1913. The original caption of the act read: "An Act to Prohibit Influencing Agents, Employees and Servants."

By a process of recodification, the caption of the act was changed to its present form. No amendment or modification to the text of the Statute has been made since its enactment in 1913.

Unfortunately, we have no precedent from cases tried under G. S. 14-353. Indeed, the learned Justice Parker of the Supreme Court of North Carolina, in writing the Court's opinion, noted (Appendix A, page A-18):

> "So far as known, after a diligent search by us, by the Attorney General and his staff, and by learned counsel who appear for appellants, no case involving the provisions of G. S. Secs. 14-353 and 14-354 has been before this Court."

Appropriate to the constitutional argument, the appellants in the trial court made motions to quash and motions in arrest of judgment. On appeal to the Supreme Court of North Carolina, they brought forward their exceptions and assignments of error based on the constitutional argument.

At the outset, and in order to confine the arguments here presented, the appellants point out that they have no argument with the purposes for which the statute was enacted. Indeed, it is admitted that a state legislature may properly enact legislation designed to curb what might be classified as "commercial bribery." It is rather the scheme, language and dragnet effect of the Statute which appellants contend bring it within the prohibition of the due process clause of the Fourteenth Amendment. It is further contended that the statute, as it is constituted, represents an arbitrary and capricious exercise of the State's police power.

Twelve states, in addition to North Carolina, have enacted statutes which have as their purpose the prohibition of corruption of employees. These States, and the citation of the analogous statutes are:

1. Connecticut—General Statutes of Connecticut, Sec. 53-256
2. Louisiana—Revised Statutes of Louisiana, 14:73
3. Massachusetts—Annotated Laws of Massachusetts, Chap. 271, Sec. 39
4. Michigan—Compiled Laws of Michigan, Ch. 750, Sec. 125
5. Nebraska—Revised Statutes of Nebraska, Sec. 28-710
6. New Jersey—Revised Statutes of New Jersey, 2:114-11
7. New York—Penal Code, Sec. 439
8. Pennsylvania—Purdon's Pennsylvania Statutes, Title 18, Sec. 4667
9. Rhode Island—Title 11, Chap. 7, Sec. 3-4
10. South Carolina—Code of Laws of South Carolina, Sec. 16-570
11. Virginia—Code of Virginia, Title 18, Sec. 366
12. Wisconsin—Wisconsin Statutes, Ch. 134.05

The New York statute, Penal Code, Sec. 439, is the statute which is conceded to be the "granddaddy" of the analogous statutes of other states. In the University of Pennsylvania Law Review, Vol. 108, p. 852, the author of an article dealing with this type of statute said: "Since this statute (New York) is broadest in scope, has been more widely enforced than any other, and has served as a prototype for the legislation of several other states, it will be dealt with in some detail."

The New York statute, while it may be analogous to the North Carolina statute, has several distinguishing factors. For example, the New York statute requires that the agent, servant or employee, who is the object of the influence be the agent, servant or employee *of another.* (Emphasis Added) The North Carolina statute has no such language. It contains no words of limitation or definition which take out of the prohibition of the statute an employer or master dealing with his own employee or servant.

Furthermore, the New York statute contains a very important provision which is conspicuously absent in the North Carolina statute. The New York statute provides, in Section 1: "A person who gives, offers or promises to an agent, employee or servant of another any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant . . ."

It is the omissions in the North Carolina statute, along with the other language used, which appellants contend give it the vice of vagueness and bring it within that line of cases striking down statutes for want of sufficient clarity and exactness.

What standard of clarity, certainty and exactness is required to satisfy due process of law under the Fourteenth Amendment?

Most certainly, legislative bodies are not required to foresee every possible statutory violation which might at some future date come up. Mathematical certainty is not required, for few words possess the precision of mathematical symbols. This principle is most lucidly set forth in the opinion of the Supreme Court of the United States in *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 72 S. Ct. 329, 96 L. ed. 367, where the Court said:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

The North Carolina statute contains no language of limitation or definition. It has no exceptive provisions which might make application of the statute sufficiently definite. As it is written, the statute applies to an employer or master dealing with his own servant or employee. It makes no difference under the North Carolina statute that the master or employer has knowledge of or consents to dealing with his employee. Furthermore, the statute requires no criminal or corrupt intent on the part of persons who would violate its terms.

One of the leading cases with regard to the standard of definiteness required by due process of law as to penal statutes is *Connally* v. *General Construction Company*, 269 U.S. 385, 46 S. Ct. 126. In defining the exactness required of penal statutes, Justice Sutherland, speaking for the Court, said:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The standards of due process of law, when applied to penal statutes, such as G.S. 14-353, require a degree of certainty, not only to the persons within the scope of the act, but also as to the standard of guilt. In other words, the acts condemned by the statute must be defined with sufficient clarity that persons of ordinary intelligence can, by reading the terms thereof, determine what course of conduct is prohibited thereby.

In *Winters* v. *New York*, 333 U.S. 507, 68 S. Ct. 665, the Court declared:

> "The standard of certainty in statutes punishing for offenses is higher than in those depending primarily on civil sanctions for enforcement. The crime 'must be defined with appropriate definiteness'. (citing cases) There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, *Lanzetta* v. *New Jersey*, 306 U.S. 451, or in regard to the applicable tests to ascertain guilt."

In *United States* v. *Cardiff*, 344 U.S. 174, 97 L. ed. 200, a penal provision of the Pure Food and Drug Act was before the Court. The particular provision had been challenged as to its vagueness. Justice Douglas, speaking for the Court, summarized the evils of a vague statute when he said:

> "The vice of vagueness in criminal statutes is the treachery they conceal in determining what persons are included or what acts prohibited. Words which are vague and fluid (citing cases) may be as much of a trap for the innocent as the ancient laws of Caligula."

When General Statute 14-353 is put upon the scales and weighed against the requirements of due process, it is submitted that it does not measure up. The omissions of the statute—what it does not say—are the vice of the statute. By employing the broadest of language the statute acts as a dragnet, sweeping everything in its path. There is no limiting, explicative or defining language in the statute; nothing to draw the broad terms employed therein to a reasonable focus.

The words "any person" mean exactly that, and do, of necessity, include the employer or master himself. The terms "any agent, employee or servant" are used in their broadest sense. It makes no difference, apparently, that an employer may be dealing with his own employee. Without giving a strained construction to the statute, the appellants submit that ordinary men are left to guess as to application of the statute. Does it include an employer dealing with his own employee? Would it prohibit the payment of a bonus as an incentive to better work? Would it prohibit the employee from accepting any gift, gratuity, or promise with the understanding that he would be influenced in relation to his work?

The appellants do not hold out the New York statute (Penal Code Sec. 439) as being the guiding star of due process of law. Indeed, we believe and like to think that our legislative body is as enlightened as that of the Empire State. Yet, we think it appropriate and pertinent to point out that the New York statute makes it clear that the dealings between a master and his own servant do not violate the law. What New York has made clear by explicit language, North Carolina has left to the guessing game.

When the learned Justice of the North Carolina Supreme Court rendered the opinion of the Court on February 2, 1963, he pointed out that North Carolina had modeled its statute after that of New York. (See Appendix A, page A-19) It may be true, but what was omitted from G.S. 14-353 left it wanting for clarity and certainty and placed it within those enactments which cannot measure up to due process.

It is important to note also that in North Carolina the offense set forth in G.S. 14-353 is committed even though the master or employer knew about it and consented to it. The North Carolina statute contains no exceptive language which would exempt from its terms those dealings of an employee done openly with the knowledge and consent of his employer.

In our search through the reports of other states having statutes analogous to that in North Carolina, we find only one case where a constitutional challenge to the statute was made. In *People* v. *Davis*, 160 N.Y.S. 769, the defendant was indicted for violating the statute. Defendant, according to the bill of indictment, offered and gave to an employee of R. H. Macy & Co., who was purchasing agent for the company, the sum of ten dollars ($10.00) as a bonus for selling to Macy's a quantity of sponges. The defendant challenged the statute on the grounds that it violated Article I, Section 10, of the United States Constitution and the equal protection clause of the Fourteenth Amendment.

The Court upheld the statute, but noted in its opinion that the statute applies to the employees *of another* and the dealings prohibited must be "without the knowledge and consent of the employers." The Court also noted that the bonus or commission must be secretly given.

The New York Court, in *Davis* (supra), was considering a statute which, appellants contend, is significantly differ-

ent from the North Carolina statute. Furthermore, the constitutional challenge of the defendant in *Davis* (supra) was on grounds not presented in this appeal.

It is of interest to note that the analogous statute of Pennsylvania (Title 18, Section 4667) requires that the gift, gratuity or promise be made *to the employee of another* (Emphasis Added) before it falls within the statutory condemnation. Additionally, and also like the New York statute, the Pennsylvania statute requires that the gift, gratuity or promise be made *without the knowledge of the employer* (Emphasis Added). The custom of tipping is explicitly excluded from the statute.

The Virginia statute (Code of Virginia, Title 18, Sec. 336) contains similar provisions as far as the knowledge and consent of the employer is concerned. Also, the Virginia statute distinguishes between influenced conduct intended to be beneficial to the employer's trade or business and that intended to be prejudicial.

It is the combination of broad terms used and omissions made which, appellants contend, bring the North Carolina statute to disrepute and make it unfair when measured by the scales of due process under the Constitution. Due process cannot be made to depend upon the fair administration of a bad law. It cannot be left to depend upon a particular prosecutor's notion of fair play or justice. It is not enough to say that the statute would never be enforced in such a manner as to condemn innocent persons carrying out innocent acts, for the statute must be measured by what can be done by its terms. The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority, be done. *McGehee, Due Process of Law*, p. 82; *Bowie* v. *West Jefferson*, 231 N. C. 408. Furthermore, a statue must rest not only on what it contains, but on what it lacks.

It is submitted that what General Statute 14-353 lacks is as important as what it contains. It is the admixture of

content and omission which renders the statute vague and places those who would come within its terms in a position of having to speculate as to its meaning and the course of conduct prohibited thereby.

The Statute Constitutes an Arbitrary and Capricious Exercise of the Police Power of the State.

In an earlier portion of this Statement, the appellants took the position that the General Assembly of North Carolina has the power to make criminal those things which General Statute 14-353 is designed to prohibit. It is not contended that the General Assembly of North Carolina does not have the authority and power to make criminal those acts which might be classified as bribery of employees.

Appellants do contend, however, that the manner in which the statute is drawn necessarily makes its enforcement arbitrary.

In a state case, *State* v. *Diamond*, 27 N.M. 477, the Supreme Court of New Mexico said:

> "Where a statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is reasonble to presume were intended to be made criminal, it will be declared void for uncertainty."

Along the some line, the Supreme Court of Alabama, in striking down a penal statute of that State on grounds the statute condemned the innocent as well as the represensible, said (*Kahalley* v. *State*, 48 So. 2d 794):

> "A cursory inspection of the Act, we think, will point up its deficiencies. Undoubtedly it was intended to serve a useful purpose and to bring to justice 'peeping toms.' But, regretably, the act sweeps within its influence conduct neither evil in nature or detrimental to the public interest, which could not be described as criminal. Many innocent situations might be con-

> ceived, such as a postman, endeavoring to deliver a letter or package, gazing or peeping in the window or door to see if anyone is at home; the iceman seeking to deliver ice at the back door . . .; the laundryman or salesman or anyone going to a home not under his control, whether to transact business or on a social visit, gazes in . . ., into a lighted room as he passes closely by the house along the sidewalk . . . . It must be manifest, as written, it could be an instrument of oppression and a tool of tyranny and is of that character of legislation that has been condemned as repugnant to the fourteenth amendment."

In *State* v. *Prince*, 52 N.M. 15, a penal statute of the State of New Mexico pertaining to embezzlement was involved. The statute, drawn in such a manner that an owner of property could be convicted of embezzlement of his own property, was declared unconstitutional by the New Mexico Court. In so holding, the Court said:

> ". . . Then it can be said a person having property of another in his possession, which he believes to be his own could possibly know that he had violated the law when he sells it or otherwise appropriates it to his own use. But it clearly appears from reading the statutes in question, such appropriation is made a crime. Under its terms there is no defense for simple conversion, and to make an act innocent itself a crime, and criminal to those who might perchance fall within its interdiction, is inconsistent with law. The statute is uncertain in its meaning, vague and indefinite."

The Court, dealing further with the question of challenges to the constitutionality of penal statutes, noted, p. 995:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it . . . ."

In putting a statute to the constitutional test, the Court is to look to the face of the statute, and not to the bill

of indictment, to make its determination. It is the statute and not the accusation which proscribes the rule to govern conduct and even though the defendant may be charged with the most reprehensible conduct, the Court is concerned with the statute under which the indictment is drawn.

In *United States* v. *De Cadena*, 105 F. Supp. 202, the Federal District Court stated the rule thusly (p. 204):

> "A statute challenged as repugnant to the due process clause of the fifth amendment must be tested 'on its face' because it is the statute, not the accusation under it, that prescribes the rule to govern conduct and warn against transgressions."

"If on its face the challenged provision is repugnant to the due process clause, specification of the details of the offense intended to be charged would not serve to validate it." *State* v. *Prince* (supra).

Furthermore, in applying constitutional tests to a penal statute, the Court must consider what may be done under authority of the statute, and not what has been done under it. In this respect, see also: *Pierce* v. *United States*, 314 U.S. 306, 87 L.ed. 226; *Holmes* v. *State Board of Finance*, 69 N.M. 430, 14 Am. Jur., Criminal Law, Sec. 19.

It is submitted that the rights of all people, including appellants, ought not be made to depend upon penal statutes drawn in such a manner as General Statute 14-353. It may be that no other persons have ever been tried under the statute during its existence of fifty years. It may be that no other persons will ever be tried under the statute in its present form. This does not excuse a bad law, one drawn in such a manner that reasonable men must speculate as to its scope and guess as to its meaning.

Finally, although the record dose not reveal it, the appellants deem it of importance that the original bill of indictment against them was not laid under General Stat-

ute 14-353. The State first elected to indict the appellants, Brewer and Robert A. Burch under a statute of North Carolina which makes it a *felony* for any employee of the Highway Commission to ". . . *knowingly* or *fraudulently* perform any act *with intent to injure the State*. . . . "

The State, instead of proceeding under this obviously cogent statute, took a noll prosequi and, in a fifty page indictment charged appellants and others under a misdemeanor statute (G.S. 14-353) which does not require that an act be done knowingly or fraudulently or with intent to injure anyone. It is a statute so vague and so devoid of the usual criminal elements that conviction under it does not require proof that a crime was committed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code. It is submitted that the Court ought to entertain that jurisdiction.

Respectfully submitted,

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s/ BERNARD A. HARRELL
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APPENDIX

APPENDIX A

OPINION AND JUDGMENT OF THE NORTH CAROLINA SUPREME COURT.

No. 441

STATE OF NORTH CAROLINA

v.

PIERCE OLIVER KIDD BREWER, ROBERT A. BURCH, ROBERT M. BURCH, GEORGE MASEFIELD, MARTIN J. HAMILTON, WALTER SCHOENFELDT, PFAFF & KENDALL, a corporation, TRAFFIC AND STREET SIGN COMPANY, a corporation.

Supreme Court of North Carolina

Feb. 1, 1963.

Defendants were charged with conspiracy to violate and with violating the statute prohibiting influencing agents and servants in violating duties owed employers, and from a judgment of the Superior court, Wake County, Raymond B. Mallard, J., some of the defendants appealed. The Supreme Court, Parker, J., held, inter alia, that the statute prohibiting influencing agents and servants in violating duties owed employers is not repugnant to the "due process of law" clause of the Fourteenth Amendment to the United States Constitution or to "the law of the land" clause of the State Constitution, and is a reasonable and proper exercise of the police power of the State.

Affirmed.

Criminal prosecution tried upon an indictment containing twelve counts, and taking thirty-six pages of the record to reproduce it.

The first count in the indictment reads:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT THAT Pierce Oliver Kidd Brewer, Robert A. Burch, Robert M. Burch, George Masefield, Martin J.

Hamilton, Walter Schoenfeldt, Pfaff & Kendall, a corporation, acting through its officers, agents and employees and Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, late of the County of Wake, on or about the 1st day of August, 1957, as well before as after said date, and continuing from said date until on or about the 1st day of February, 1962, with force and arms, at and in the County aforesaid, unlawfully and willfully and with common design and set purpose and in a secret manner, did combine, confederate, scheme, agree and conspire together and with each other and with divers other persons to unite for the common object and purpose of willfully and unlawfully violating the provisions of the General Statutes of North Carolina, Chapter 14, Section 353, in that the said Pierce Oliver Kidd Brewer, individually and as agent and employee of Pfaff & Kendall, a corporation, and as agent and employee of Traffic and Street Sign Co., a corporation, the said Robert A. Burch, the said Robert M. Burch, the said George Masefield, individually and as agent, employee and Division Sales Manager of Pfaff & Kendall, a corporation, the said Martin J. Hamilton, individually and as agent, employee, officer and Vice President of Pfaff & Kendall, a corporation, and as agent, employee, officer and Vice President of Traffic and Street Sign Co., a corporation, the said Walter Schoenfeldt, individually and as agent, employee and General Manager of Traffic and Street Sign Co., a corporation, the said Pfaff & Kendall, a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, George Masefield, Martin J. Hamilton and others and the said Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, Martin J. Hamilton, Walter Schoenfeldt and others willfully and unlawfully agreed and conspired together and with each other, in a secret manner, that the said Pierce Oliver Kidd Brewer, Robert M. Burch, George Masefield, Martin J. Hamilton, Walter Schoenfeldt, Pfaff & Kendall, a corporation, acting throug its officers, agents and employees and Traffic and Street Sign Co., a corporation, acting

through its officers, agents and employees, willfully and unlawfully would promise, offer and give, and thereupon did willfully and unlawfully promise and offer, in a secret manner, to Robert A. Burch, an agent and employee, to wit. the Traffic Engineer, of the State Highway Commission, an agency of the State of North Carolina, money, gifts, gratuities and other things of value with the intent and for the purpose of influencing the actions of the said Robert A. Burch in relation to his employer's business, i.e., to influence the said Robert A. Burch, who as Traffic Engineer for the State Highway Commission was responsible for and in charge of the writing of specifications and the drawing of plans for the procurement and erection of highway signs for the highways in North Carolina, to write and have written such specifications and to draw and have drawn such plans in a manner so as to favor the products of Pfaff & Kendall, a corporation, and to favor the products of Traffic and Street Sign Co., a corporation, and the said named defendants, Pierce Oliver Kidd Brewer, Robert A. Burch, Robert M. Burch, George Masefield, Martin J. Hamilton, Walter Schoenfeldt, Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, further willfully and unlawfully agreed and conspired together and with each other that the said Robert A. Burch, as agent and employee, to wit: the Traffic Engineer, of the State Highway Commission, an agency of the State of North Carolina, would willfully and unlawfully accept money, gifts, gratuities and other things of value under an agreement and with an understanding, which said agreement and understanding was thereupon entered into, that the said Robert A. Burch willfully and unlawfully would, in relation to his employer's business, write and have written specifications and draw and have drawn plans for the procurement and erection of highway signs in such a manner so as to favor the products of Pfaff & Kendall, a corporation, and to favor the products of Traffic and Street Sign Co., a corporation, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The other eleven counts in the indictment charge the defendants Brewer and the two Burches with specific overt acts in violation of G. S. 14-353 and in furtherance of the conspiracy alleged in count one of the indictment. All of the other defendants charged in the first count in the indictment are similarly charged in most, but not all, of the other eleven counts in the indictment.

Plea: Not Guilty by all the defendants.

At the end of the State's evidence the court allowed motions for judgments of nonsuit on all counts in the indictment as to all the defendants except appellants Brewer and the two Burches, and allowed motions for judgments of nonsuit on the second, third and fourth counts in the indictment as ta the appellants Brewer and the two Burches. Defendants offered no evidence.

Verdict as to Pierce Oliver Kidd Brewer: Guilty of counts one, five, six, seven, eight, nine, ten and eleven as charged in the indictment; and Not Guilty of count twelve as charged in the indictment.

Verdict as to Robert A Burch: Guilty of counts one, five, six, seven, eight, nine, ten and eleven as charged in the indictment; and Not Guilty of count twelve as charged in the indictment.

Verdict as to Robert M. Burch: Not Guilty of counts one, five, six and twelve as charged in the indictment, and Guilty of counts seven, eight, nine, ten, and leveen as charged in the indictment.

From the judgments entered against them separately, Pierce Oliver Kidd Brewer, Robert A. Burch and Robert M. Burch appeal.

Atty. Gen. T. W. Bruton and Asst. Atty. Gen. Harry W. McGalliard, for the State.

Seawell & Harrell, by Bernard A. Harrell, Raleigh, for defendant appellant Brewer.

William T. Hatch, and Elbert Richard Jones, Jr., Raleigh, for defendant appellants Robert A. Burch and Robert M. Burch.

PARKER, Justice.

All the defendants, except the corporate defendants, charged in the indictment, prior to pleading to the indictment, filed a joint written motion to quash the indictment, and each and every count therein. The motion to quash covers more than fourteen pages in the record. The motion to quash avers that the first count in the indictment should be quashed for the following reasons: One. It shows on its face the offense charged in a misdemeanor which it alleges occurred on or about 1 August 1957, and therefore the prosecution is barred by the two-year Statute of Limitations, G. S. 15-1. Two. It "contains within one count three separate and distinct averments of conspiracy: (a) a conspiracy to violate G. S. 14-353; (b) a conspiracy that the defendants, with the exception of Robert A. Burch, conspired to offer and promise money to Robert A Burch, with the intent and purpose of influencing his activities in relation to his employer's business; (c) the defendants, other than Robert A. Burch, conspired that Robert A. Burch would accept money or other gratuities." This is duplicity and a failure to comply with the requirements of G. S. 15-152. Three. It fails to comply with the requirements of G. S. 15-153. Four. G. S. 14-353, upon which the indictment is based, is unconstitutional and repugnant to the "due process of law" clause of section one of the 14th Amendment to the United States Constitution, and to "the law of the land" clause of Article I, Section 17, of the North Carolina Constitution, in that the statute is so vague and indefinite, it is void for uncertainty, and further the statute constitutes an arbitrary, capricious and unreasonable exercise of the police power of the State. The motion to quash alleges that the remaining

eleven counts in the indictment should be quashed for substantially the same reasons as the first count in the indictment should be quashed.

The court denied the joint motion to quash the indictment and each and every count therein, and the defendants who made the motion excepted. Whereupon, all the defendants enter pleas of Not Guilty. Defendants Brewer and the two Burches assign as errors the denial to quash the counts in the indictment upon which they were convicted.

Defendant Brewer has filed a brief. The defendants Burch have filed a joint brief. In the two briefs the first question presented for decision is: Whether or not the prosecution of the first count in the indictment is barred by G. S. 15-1. Defendant Robert M. Burch was acquitted on the first count.

The part of the statute relevant to appellants' contention is: ". . . all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards . . .". The statute has a proviso, which is not applicable here.

(1) A violation of G. S. 14-353 is explicitly stated by the statute to be a misdemeanor. The State makes no contention that a violation of G. S. 14-353 is a malicious misdemeanor. In fact, a violation of this statute is not a malicious misdemanor. State v. Frisbee, 142 N. C. 671, 55 S.E. 722.

(2) In this jurisdiction a conspiracy to commit a misdemeanor is a misdemeanor. State v. Abernethy, 220 N. C. 226, 17 S. E. 2d 25.

(3) "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete." State v. Knotts, 168 N. C. 173, 188, 83 S. E. 972,

979. "No overt act is necessary to complete the crime of conspiracy," State v. Davenport, 227 N. C. 475, 494, 42 S. E. 2d 686, 699, or as stated in State v. Whiteside, 204 N. C. 710, 169 S. E. 711, "the 'conspiracy' is the crime and not its execution."

The indictment was found at the April Assigned Term 1962 of Wake County Superior Court, and the trial term was the June 1962 Term of said court. The first count in the indictment charges that all the defendants "on or about the 1st day of August, 1957, as well before as after said date, and continuing from said date until on or about the 1st day of February, 1962 * * * unlawfully and willfully and with common design and set purpose and in a secret manner, did combine, confederate, scheme, agree and conspire together and with each other * * *."

Appellants argue that in North Carolina a criminal conspiracy is a completed crime as soon as the union of wills for the unlawful purpose is perfected, that no overt act is necessary to complete the crime of conspiracy, that count one in the indictment alleges that the conspiracy existed and was completed on or about "the 1st day of August 1957," that the indictment was found at the April Assigned Term 1962, and, therefore, the prosecution on the first count in the indictment is barred by G. S. 15-1.

Defendant Brewer and defendant Robert A. Burch were convicted on the fifth, sixth, seventh, eighth, ninth, tenth and eleventh counts in the indictment, all of which charge overt acts in furtherance of the conspiracy charged in the first count of the indictment on the following dates respectively: First count, on or about 1 June 1960; sixth count, on or about 16 June 1960; seventh count, on or about 23 August 1960; eighth count, on or about 23 August 1960; ninth count, on or about 1 February 1961; tenth count, on or about 1 February 1961; eleventh count, on or about 1 June 1961. Defendant Robert M. Burch was acquitted on counts five and six.

In United States v. Kissel, 218 U. S. 601, 31 S. Ct. 124, 54 L. Ed. 1168, the first count of the indictment alleges "that the defendants in error and others named, on December 30, 1903, and from that day until the day of presenting the indictment (July 1, 1909), have engaged in an unlawful conspiracy in restraint of trade in refined sugar among the several states of the Union * * *. It then sets forth at length, the means by which the alleged purpose was to be accomplished, and what are put forward as Mr. Justice Oliver Wendell Holmes, speaking for the Court, said in replying to a contention of the defendants in error similar to the contention made here:

> "The defendants argue that a conspiracy is a completed crime as soon as formed, that is it is simply a case of unlawful agreement, and that therefore the cotinuando may be disregarded, and a plea is proper to show that the statute of limitatoins has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts, or that the results of a successful conspiracy endure to a much later date, does not affect the character of the crime.
>
> "The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irvine, 98 U.S. 450, 25 L. Ed 193, 3 Am. Crim. Rep. 334. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic

series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not a contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

* * * * *

"To sum up and repeat: The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue, and not by a specific plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise, more than three years before July 1, 1909, will be open and unaffected by what we now decide."

In substantial accord with the Kissel case, see Hyde v. United States, 225 U.S. 347, 32 S. Ct. 793, 56 L. Ed. 1114; Brown v. Elliott, 225 U. S. 392, 32 S. Ct. 812, 56 L. Ed. 1136.

In Pinkerton v. United States, 5 Cir., 145 F. 2d 252, W. Daniel Pinkerton and Walter G. Pinkerton were indicted with three others on a conspiracy charge to violate certain specified sections of the Internal Revenue Code of the United States. The indictment contained only one count, and charged that the conspiracy set forth had existed continuously from the 12th day of August, 1938, until the 27th day of June, 1943, and within three years of the finding of the indictment which was returned by the grand jury on February 19, 1944. There were nineteen overt acts charged in the indictment, the first six of which, it is without dispute, were committed more than three years before the return of the indictment. The two Pinkertons were convicted and appealed. The Court in its opinion said:

> "The indictment was in all respects free from error. The court, however, failed to correctlyl define the charge of conspiracy as laid in the indictment and to point out to the jury what evidence was necessary to keep the conspiracy alive and bring it within the statute of limitations, and also to limit the evidence as to the overt acts committed before the three year statute ran. The charge was further confusing, we think, for failure to fully instruct the jury that the guilt of the defendants could only be predicated on one or more overt acts proved to have been committed within the three year limit of the statute.
>
> " 'Where the conspiracy contemplates various overt acts and the consequent continuance of the conspiracy beyond the commission of the first act, each overt act thereafter gives a new, separate, and distinct effect to the conspiracy, and constitutes another agreement, so that a prosecution is not barred by the statute of limitations until three years after the commission of the last overt act alleged and proved.' Hedderly v. United States, 9 Cir., 193 F. 561, 569; United States v. Kissel, 218 U. S. 601, 31 S. Ct. 24, 54 L. Ed. 1168.
>
> "A conspiracy and overt acts may be charged in the indictment which are not within the three year period

of the statute of limitations, but they must be limited to show only the conspiracy and its continuation. Such overt acts beyond the three year limit of the statute are not relevant to show guilt. To convict, an overt act must be alleged and proved which occurred within the three year statute of limitations."

In Scarlett v. State, 201 Md. 310, 93 A. 2d 753, Scarlett, Harry Gross and Horace B. Cann were tried in December 1951 on an indictment charging that on 1 January 1947, and thence continually until 20 August 1951, they unlawfully conspired together and with certain other persons to violate the lottery laws of the State of Maryland. The jury found Scarlett and Gross guilty, and Cann not guilty. In February 1952, the Supreme Bench of Baltimore City granted them a new trial. At the second trial in March 1952, the jury found Scarlett guilty, and Gross not guilty. From a sentence of imprisonment Scarlett appealed. In affirming the judgment below, the Court, so far as relevant here, said:

"Appellant also attacks the indictment on the ground that the object of the conspiracy, alleged to have continued nearly five years, from January 1, 1947, to August 20, 1951, was in fact not inherently continuous. He claims that any participant in the conspiracy could withdraw from it at any time. He also suggests that Edgar Wilkes testified that he participated only in 1949 and 1950, while Cann testified that he participated only a few months prior to his arrest on June 29, 1951. The argument seems to be that the conspiracy was complete on the day defendants were charged to have first conspired, January 1, 1947, and that a conspiracy is not a continuing offense in such a sense that each overt act will remove the bar of the statute of limitations against the original conspiracy, and in order to avoid the bar of indictment must charge a conspiracy and an overt act within the limitation period.

"It is true that in Maryland all prosecutions for the crime of conspiracy must be commenced within two years after the commission of the offense. Code 1951,

art. 27, 46. However, where a conspiracy contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, such continuous co-operation is a single conspiracy, rather than a series of distinct conspiracies.

"In United States v. Kissel, 218 U. S. 601, 31 S. Ct. 124, 126, 54 L. Ed. 1168, where the indictment charged an unlawful conspiracy in restraint of trade in refined sugar on December 30, 1903, and continuing from that day until July 1, 1909, the defendants argued that the alleged conspiracy was a completed crime as soon as it was formed, and that a plea was proper to show that the statute of limitations had run. In rejecting that argument, Justice Holmes, speaking for the Court, said. (We omit a long quotation from what Mr. Justice Holmes said, because we have quoted it above.)

"In Archer v. State, 145 Md. 128, 147, 125 A. 744, the Court of Appeals, in accord with the view expressed by the Supreme Court, held that, although the crime of conspiracy is completed when the unlawful agreement is reached, it is not then exhausted in the sense that the statute of limitations cannot be tolled by the commission of a subsequent overt act. We reaffirm that proposition."

(4) The authorities are in conflict as to when the Statute of Limitations operates to bar a prosecution for conspiracy. Some Courts take the view that a conspiracy is not a continuing offense in the sense that each overt act will remove the bar of the Statute of Limitations against the original conspiracy. Other Courts take the view, and this seems to be in accord with the weight of later authorities, and in our opinion is the better view, that a conspiracy may be a continuing crime and that it is a continuing offense until its abandonment or success, or as long as any concerted action pursuant to the conspiracy continues, or as long as there is a course of conduct in violation of law to effectuate its purpose, or when the plot contemplates bringing to pass a continuous result that will not continue

without the continuous co-operation of the conspirators to keep it up, as long as there is such continuous co-operation pursuant to the conspiracy. In brief, that the conspiracy is a continuing offense so that the State of Limitations is tolled as to the original conspiracy each time an overt act is committed in furtherance of the purpose and design of the conspiracy. Annotation 97 A.L.R. 137; 22 C.J.S. Criminal Law 227(3), p. 592; 11 Am. Jur., Conspiracy, sec. 25. In all three of these works many cases are cited which supports the texts.

The criminal offense of conspiracy is complete in North Carolina, as we have stated above, and at common law, as soon as the confederacy or combination is formed. In many jurisdictions, however, the common law rule is modified by statutes requiring that to constitute the crime of conspiracy there must be an unlawful agreement and an overt act to effect the object of the agreement. This is true of the crime of conspiracy as defined in the Federal Criminal Code. Annotation 26 A.L.R. 2d 1369. In this annotation on p. 1372 it is said:

> "Generally speaking, however, the recent cases pay scant attention to any possible differences with respect to the running of limitations as between statutory and common-law conspiracies. The cases warrant the conclusion that, as to conspirators who have not withdrawn from the conspiracy, limitations against a prosecution for conspiracy run from the time the last overt act in furtherance of the conspiracy was committed. It is believed that none of the recent cases are inconsistent with this view; as affirmatively supporting it, see the following cases: (Many cases in support of the text are cited.)"

State v. Christianbury, 44 N. C. 46, cited and relied upon by defendant Brewer in his brief, is clearly distinguishable. In that case, "the acts which are charged in the indictment, as constituting the offense, took place more than two years before the prosecution was commenced." In

the instant case count one in the indictment charges the conspiracy as continuing from on or about 1 August 1957 until on or about 1 February 1962, and in other counts in the indictment overt acts in furtherance of the purpose and design of the conspiracy and in effectuating its unlawful purpose are charged as having been committed by the alleged conspirators on or about 1 June 1960, 16 June 1960, 23 August 1960, 1 February 1961, and 1 June 1961, all within two years of the finding of the indictment as a true bill by the grand jury at the April Assigned Term 1962 of Wake County superior court.

(5) Defendants have not seen fit to bring up any of the evidence at the trial or the charge of the court. We decide here that a conspiracy may have a continuance in time, and count one and the indictment here allege that the conspiracy did so continue with the commission of overt acts by the alleged conspirators in furtherance of the conspiracy and to effectuate its unlawful purpose within two years of the finding of the indictment. The trial court correctly overuled defendants' motion to quash the first count in the indictment on the ground that a prosecution on such count was barred by G. S. 15-1.

In the two briefs of appellants the second question presented for decision is: Did the trial court err in refusing to quash the indictment on the ground that G. S. 14-353, upon which the indictment is based, is unconstitutional and repugnant to the "due process of law" clause of section one of the 14th Amendment to the United States Constitution, and to "the law of the land" clause of Article I, section 17, of the North Carolina Constitution, in that the statute is so vague and indefinite, it is void for uncertainty, and on the further ground that the statute constitutes an arbitrary, capricious and unreasonable exercise of the police power of the State?

The General Assembly at its 1913 Session enacted Chapter 190 of the Public Laws of North Carolina, which

is entitled "An act to prohibit influencing agents, employees and servants." Section one of this act is codified as G. S. 14-353, and section two of this act is codified as G. S. 14-354.

G. S. 14-353 reads:

> "Influencing agents and servants in violating duties owed employers.—Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court."

G. S. 14-354 provides that a witness may be required to give self-criminating evidence in respect to the crime denounced in G. S. 14-353, but, if he does, no suit or prosecution can be based thereon, except for perjury committed in so testifying.

(6) Appellants may challenge the constitutionality of G. S. 14-353 by a motion to quash the indictment, which

charges a violation of this statute. State v. Glidden Co., 228 N. C. 664, 46 S. E. 2d 860; 16 C. J. S. Constitutional Law 96, pp. 343-344.

(7,8) The General Assembly of North Carolina, unless it is limited by constitutional provisions imposed by the State or Federal Constitution, has the inherent power to define and punish any act as a crime, because it is indisputably a part of the police power of the State. The expediency of making any such enactment is a matter of which the General Assembly is the proper judge. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, if such be enacted, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution and the laws of the State. However, the act of the General Assembly declaring what shall constitute a crime must have some substantial relation to the ends sought to be accomplished. State v. Yarboro, 194 N. C. 498, 140 S. E. 216; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; 22 C. J. S. Criminal Law 13; 14 Am. Jur., Criminal Law, secs. 16 and 22; Wharton's Criminal Law and Procedure, 1957, Vol. I, sec. 16.

(9) In passing upon the constitutionality of G. S. 14-353, we start with the presumption that it is constitutional, and it must be so held by this Court, unless it is in conflict with some constitutional provision of the State or Federal Constitution. State v. Warren, 252 N. C. 690, 114 S. E. 2d 660; State v. Lueders, 214 N. C. 558, 200 S. E. 22. "We cannot overturn a statute because we do not like it; for our likes and dislikes affect us as citizens, not as judges." Wright v. Hart, 182 N. Y. 330, 353, 75 N. E. 404, 412, 2 L. R. A., N. S., 338, 350, 3 Ann. Cas. 263, 271.

(10) The books are filled with statements by the Courts of the rule that a crime must be defined in a penal statute with appropriate certainty and definiteness. In Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L.Ed. 322, the Court said:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notations of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

This is said in Boyce Motor Lines v. United States, 342 U. S. 337, 72 S. Ct. 329, 96 L. Ed. 367:

"A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

This Court said in State v. Hales, 256 N. C. 27, 122 S. E. 2d 768, quoting from Wharton's Criminal Law and procedure, 1957, Vol. I, sec. 18:

" 'While a penal statute must be sufficiently definite to apprise a person of ordinary intelligence of the conduct which is prohibited, it is not necessary that the

> forbidden conduct be described with mathematical precision or absolute certainty. * * * A statute is not unconstitutional as indefinite because it employs general terms, when such terms convey to a person of ordinary understanding and intelligence an adequate description of the prohibited act, for impossible standards of certainty are not required. Reasonable certainty is sufficient.' "

To the same effect, 22 C.J.S. Criminal Law 24(2)a; 14 Am. Jur., Criminal Law, sec. 19. See also, State v. Partlow, 91 N. C. 550; State v. Morrison, 210 N. C. 117, 185 S.E. 674; State v. Atlantic Ice & Coal Co., 210 N. C. 742, 188 S. E. 412.

So far as known, after a diligent search by us, by the Attorney General and his staff, and by learned counsel who appeal for appellants, no case involving the provisions of G. S. 14-353 and 14-354 has been before this Court.

Twelve states have statutes prohibiting the general practice of bribery in commercial relationships or influencing agents, employees and servants in commercial relationships, analogous to our statute codified as G. S. 14-353 and 14-354: Connecticut, Louisiana, Massachusetts, Michigan, Nebraska, New York, Pennsylvania, Rhode Island, South Carolina, Virginia, Washington and Wisconsin. In addition to statutes of this general type, there are seventeen states which have statutes making it a crime to bribe a particular type of employee, notably agents or employees in charge of purchasing or hiring: Arizona, California, Connecticut, Indiana, Kentucky, Maine, Michigan, Montana, Nevada, New Jersey, New York, Oregon, Tennessee, Texas, Utah, Washington and Wisconsin. CONTROL OF NONGOVERNMENTAL CORRUPTION BY CRIMINAL LEGISLATION, University of Pennsylvania Law Review, Vol. 108, p. 848, (1960), where on pp. 864 and 866 a chart gives the names of the states and sets forth the specific statutes. Inci-

dentally, North Carolina has statutes making athletic corruption a crime. G. S. 14-373, 14-374, 14-375, 14-376, and 14-377.

The New York statute outlaws the corruption of employees, agents and servants and of purchasing and hiring agents in particular. The University of Pennsylvania Law Review, Vol. 108, p. 852, states: "Since this statute (New York) is broadest in scope, has been more widely enforced than any other, and has served as a prototype for the legislation of several other states, it will be dealt with in some detail." In note 29 to this sentence it states that Connecticut, Massachusetts, Michigan, Nebraska, North Carolina, South Carolina, Virginia and Wisconsin, all have statutes similar to New York's. The note specifies the statute of each state, and gives G. S. 14-353 for North Carolina.

So far as the briefs of counsel and our research disclose, none of these statutes substantially similar to G. S. 14-353 has been challenged on constitutional grounds, except the New York statute in People v. Davis (Court of Special Sessions, New York County), 160 N.Y.S. 769. The New York statute, New York Penal Law, sec. 439, reads:

> "Corrupt influencing of agents, employees or servants. 1. A person who gives, offers or promises an agent, employee or servant or another, any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence such agent's, employee's or servant's action in relation to his principal's, employer's or master's business, or an agent, employee or servant who without the knowledge and consent of his principal, employer or master, requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself or to another, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business, or

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receives a reward for having so acted; or an agent, employee or servant, who being authorized to procure materials, supplies or other merchandise either by purchase or contract for or on account or the credit of his principal, employer or master, or to employ service or labor for his principal, employer or master, receives directly or indirectly, for himself or for another, a commission, discount, gift, gratuity or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other merchandise, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus; and any person, corporation, partnership or other organization who shall use or give to an agent, employee or servant of another, or any agent, employee or servant who shall use, approve, or certify, with intent to deceive the principal, employer or master, any receipt, account, invoice or other document in respect of which the principal, employer or master is interested, which contains any statement which is wilfully false or erroneous in any material particular or which omits to state fully the fact of any commission, money, property or other valuable thing having been given or agreed to be given to such agent, employee or servant, is guilty of a misdemeanor and shall be punished * * *."

The second section of the statute is substantially similar to G. S. 14-354 in respect to a person required to give self-criminating evidence.

The information in the Davis case charged that on 21 April 1914, in violation of section 439 of the Penal Law, Albert Davis—

"unlawfully gave and offered to Sheridan Gorton, Jr., who was then agent, employe, and servant of the

association called R. H. Macy & Co., and who was then authorized to procure materials, supplies and other articles by contract for his said principal and employer, the sum of $10 in lawful money of the United States of America, as a commission, discount, and bonus from the said defendant, who then and there made and had made a sale of certain sponges to the said association, and a contract for the sale of certain sponges to the said association, and furnished the said sponges to the said association * * *."

The defendant demurred to the information, upon the ground that it fails to state facts sufficient to constitute a crime, and urged that the law clause of section 439 of the Penal Law, under which the information in this case was drawn, is repugnant to Article I, section 10, of the Constitution of the United States, and to the 14th Amendment thereto, and is therefore null and void, and that said clause is likewise repugnant to Article I, sections 1 and 6, of the Constitution of the State of New York. Article I, section 1, of the Constitution of the State of New York provides:

> "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

Section 6 of the same Article reads:

> "No person shall be * * * deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The Court in an opinion by Russell, C. J., concurred in by Collins and O'Keefe, JJ., said:

> "Section 439 of the Penal Law is divisible into two parts. The first forbids a gratuity to an employe of

another in respect to his work or employment under certain conditions, 'without the knowledge and consent of the employers.' With this part of the statute we have nothing to do. The information was drawn under the wording of the second division, follows the words of the statute, and is therefore sufficient."

The Court rejected all three assertions of unconstitutionality: (1) No violation of equal protection was found because the statute "affects alike all persons similarily situated"; (2) constitutional freedom of contract may be limited by police power; and (3) as to the propriety of the exercise of the police power in this situation, the Court said:

"Without such a statute, under the fierce competition of modern life, purchasing agents and agents to employ labor can be lured all to readily into the service of hopelessly conflicting interests. * * * Sound public policy, commercial honor, and the good faith of fiduciaries and trusted employes imperatively demand some measure in the written law.

"The statute in the case at bar divests no property and harms no vested right. * * * Such customs of trade as are denounced by this statute are demoralizing to society. Acts harmful to morals are not, as contended by defendant, limited to sexual impurity and obscene publications. Bribery of purchasing agents in incompatible with commercial honor. A bonus or commission, secretly given, is nothing short of a bribe to betray one's employer. The only possible object of this bad custom is to take money from the principal and give it to his agent. No lawful business is forbidden by this act. * * *

"This discussion has been prolonged, because, so far as known, the courts have not passed upon the exact question raised in this case. We conclude that section 439 of the Penal Law is constitutional."

The State of New York in the trial court convicted a basketball referee and a union official on a charge of violating Penal Law, section 439. These convictions were upset on appeal because the acts committed by the defendants did not fall within the class of persons at which the statute was directed. People v. Levy, 283 App. Div. 383, 128 N. Y. S. 2d 275 (1954); People v. Graf, 261 App. Div. 188, 24 N. Y. S. 2d 683. In the Levy case, it is stated:

> "* * * Penal Law, 439, subd. 1, is not applicable to bribery of a referee in games or sports. That section, found in Penal Law Article 40 entitled 'Business and Trade', covers commercial fraud practiced by an employee against the financial or business interest of his employer. It has been on the books for upwards of fifty years * * *."

In People v. Jacobs, 309 N. Y. 315, 130 N. E. 2d 636, (1955), a professional photographer who had been convicted for giving money to a ship's purser to get a list of incoming passengers on an information charging a violation of Penal Law, section 439, secured a reversal on appeal, because the State failed to show that the interest of the purser's employer was involved. The Court said:

> "In order to be guilty, these moneys must have been paid to the purser to influence his action concerning a mattter affecting his employer's interest. A common illustration of such a criminal act would be payment of money to a purchasing agent, to cause him to buy goods for his employer from one vendor rather than from another."

In these three cases it seems no question was raised as to the constitutionality of Penal Law, Section 439; if so, it does not appear in the reported cases.

Use of the New York statute in civil proceedings has been more frequent. Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 108 N. Y. S. 830, involved a fact situation

which is typical. The plaintiff sold and delivered a quantity of goods to the defendant and, upon failure of payment for the goods, brought an action for the price. Defendant sought dismissal on the grounds that the contract of sale was the result of a bribe which had passed between plaintiff and defendant's purchasing agent in violation of the Penal Code, section 384r, in respect to corrupt influencing of agents, employees or servants, which is substantially similar to the present New York Penal Law, section 439. Defendant buyer admitted that he suffered no injury because of the bribe but insisted that the Court should refuse to enforce the contract of sale on "broad moral grounds." The Court agreed, holding that if a buyer can show that the bribe and the contract of sale were parts of the same transaction the sale will be considered void and the Court will leave the parties as it finds them. The Court said:

> "• • • the defendant should have been permitted to prove the facts pleaded as a separate defense, and that, if they be established, the plaintiff will then be shown to have committed a crime in obtaining the very contracts which he asked the aid of the court to enforce, and should be denied assistance."

The rule of Sirkin, that a contract of sale entered into as a result of bribing an employee will not be enforced against the buyer, has become well established in New York. Kraus v. H. Pacter & Co., 134 Misc. 247, 234 N. Y. S. 687; Bolotin v. Jefferson, 98 Misc. 603, 163 N. Y. S. 59; General Tire Repair Co. v. Price, Sup., 115 N. Y. S. 171.

Stone v. Freeman, 298 N. Y. 268, 82 N. E. 2d 571, was a broker's action for commissions earned in arranging sale of clothing to French Purchasing Mission by defendant, in which counterclaims were filed alleging defendant's agreement to pay and payment of certain sums to plaintiff on his agreement to divide them with purchaser's representative, and praying return to defendant of unpaid part of such representative's agreed share. The counterclaims

plainly allege a conspiracy to violate section 439 of the Penal Law of the State of New York. The Court held that the motion to dismiss the counterclaims in the amended answer should be granted. In its opinion the Court said: "For no court should be required to serve as paymaster of the wages of crime, or referee between thieves."

In Donemar, Inc. v. Molloy, 252 N. Y. 360, 169 N. E. 610, it was held that where a seller of merchandise entered into a corrupt bargain with employee of purchaser for the payment of secret commissions in effecting a settlement, the purchaser was entitled to recover amount of secret commissions, regardless of whether there was disparity between value of goods received and consideration paid in settlement of claim. The Court said:

> "Penal Law (Consol. Laws, c. 40) 439, makes it a misdemeanor to give or receive money for the corrupt influencing of agents, employees, or servants. It would be a strange miscarriage of justice if the corrupting vendor and the corrupted agent of the vendee could retain the fruits of their crime and say that because the settlement was a fair one, the vendee sustained only nominal damages or no damages."

(11) G. S. 14-353 is divisible into four parts. First, it provides that "(a)ny person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business" shall be guilty of a misdemeanor. (Emphasis supplied.) The intent specified is an essential element of the offense. The acts prohibited are stated in words sufficiently explicit, clear and definite to inform any man of ordinary intelligence what conduct on his part will render him liable to its penalties. If a person does the prohibited act or acts specified in this part of the statute with the intent explicitly stated therein, he is guilty of what is commonly called "commercial bribery." In American Distilling Co. v. Wisconsin

Liquor Co., 7 Cir., 104 F. 2d 582, 123 A.L.R. 739, the Court said: "The vice of conduct labeled 'commercial bribery,' as related to unfair trade practices, is the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers." Surely a violation of this part of G. S. 14-353 is related to unfair trade practices, and is an unfair method of competition. The contention of defendants that the language of this part of the statute is so broad as to prohibit the customary habit of tipping is untenable. Customary tipping is in obedience to custom or in appreciation of service, and is done with no intent to influence the action of the person receiving the tip in relation to his or her employer's business, and as to tipping done in such a manner the statute is not applicable. However, it is possible that a person by tipping an agent, servant or employee with the intent specified in this part of the statute could bring himself within its penalties: e.g., by giving substantial amounts or considerations and calling them tips.

The second part of the statute provides that "any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business" shall be guilty of a misdemeanor. (Emphasis supplied.) The agreement or understanding in the words emphasized is an essential element of the offense. Although this part of the statute employs general terms, the words used are sufficiently explicit and definite to convey to any man of ordinary intelligence and understanding an adequate description of the prohibited act or acts, and to inform him of what conduct on his part will render him liable to its penalties. The plain intent and purpose of this part of G. S. 14-353 is to prohibit any agent, employee or servant from being disloyal and unfaithful to his principal, em-

ployer or master. The Holy Bible in the New Testament, St. Matthew, chapter 6, verse 24 (King James Version), says: "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." A statement of an eternal truth.

The third and fourth parts of G. S. 14-353 refer to a commission, discount or bonus received by any agent, employee or servant under the circumstances therein specified and to any person who gives or offers such an agent, employee, or servant such commission, discount or bonus.

The indictment charges the defendants with a violation of the first two parts of G. S. 14-353. It is so stated in defendants' briefs.

We are here concerned with the first two parts of G. S. 14-353, which are divisible and separable from the remainder of the statute.

(12) In our opinion, and we so hold, the first two parts of G. S. 14-353, which the indictment charges the defendants violated, are not repugnant to the "due process of law" clause of section one of the 14th Amendment to the United States Constitution, and to "the law of the land" clause of Article I, section 17, of the North Carolina Constitution, and are a reasonable and proper exercise of the police power of the State.

The activities necessary to accomplish the offenses prohibited by G. S. 14-353, and similar statutes, require no violence, embody no traces in lasting form, and frequently, if not almost entirely, have no witnesses other than persons implicated or potentially implicated. Once completed, they leave few persons, if any, aware of being damaged. The enforcement problems, which arise from the very nature of the offenses, are extremely difficult, because of lack of evidence. This is probably the prime reason why so few persons have been prosecuted for violating these statutes.

In view of the structure of modern business organizations and the demands made upon the individual by present-day business, both the opportunities, and the practice of bribing or unlawfully influencing the agents and employees of others seems to be increasing. There is general agreement that where an agent or employee receives money or other considerations from a person in return for the agent's or employee's efforts to further that person's interest in business dealings between him and the principal or employer, such an act or acts on the part of the agent or employee and on the part of the person who gives the money or other consideration to the agent or employee should be prohibited. For articles in respect to the acts prohibited by G. S. 14-353, and similar statutes, and "commercial bribery" and influencing of employees, see: Minnesota Law Review, Vol. 46, p. 599 (1961-2), "Commercial Bribery: The Need for Legislation in Minnesota"; University of Pennsylvania Law Review, Vol. 108, p. 848 (1960), "Control of Non-governmental Corruption by Criminal Legislation"; Harvard Law Review, Vol. 45, p. 1248 (1931-2), "Bribery in Commercial Relationships"; Columbia Law Review, Vol. 28, p. 799 (1928), "Commercial Bribery." In the Minnesota Law Review Article, p. 630, there is set forth a Proposed Commercial Bribery Statute. We set forth section 1, subdivisions 1 and 2, of the Proposed Statute because of its similarity with the first two parts of G. S. 14-353.

> "The following persons shall be guilty of commercial bribery:
>
> "Section 1. subdivision (1) Any person who gives, offers or promises, directly or indirectly, any gift or gratuity to any agent without the knowledge and consent of his principal and with the intent to influence the agent's action in relation to his principal's affairs; or
>
> "subd. (2) Any agent who requests or accepts, directly or indirectly, any gift or gratuity or a promise

to make a gift under an agreement or understanding that he act in any particular manner in connection with his principal's affairs, or receives a reward for having so acted;"

(13, 14) Defendant Robert M. Burch assigns as error the denial by the trial court of his motion to set aside the verdict against him of guilty of counts seven, eight, nine, ten and eleven as charged in the indictment, on the ground that the found him not guilty of count one in the indictment, and therefore the verdict is inconsistent. Counts seven, eight, nine, ten and eleven in the indictment are set forth in thirteen pages in the record. All of these counts charge the defendants Brewer and Robert A. Burch and Robert M. Burch and others with specific substantive offenses in violation of G. S. 14-353 and with overt acts in furtherance of the conspiracy alleged in the first count in the indictment.

Count seven in the indictment is typical of counts two through twelve, both inclusive, in the indictment. The jury's verdict was that defendant Brewer "is guilty of violation of G. S. 14-353 as charged in the 7th count in the bill of indictment." The jury returned an identical verdict on the seventh count in the indictment against defendant Robert A. Burch and also against defendant Robert M. Burch. Count seven is as follows:

"And the Jurors Aforesaid, Upon Their Oath, Do Further Present That Pierce Oliver Kidd Brewer, Robert A. Burch, Robert M. Burch, George Masefield, Martin J. Hamilton, Walter Schoenfeldt, Pfaff & Kendall, a corporation, acting through its officers, agents and employees and Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, late in the County of Wake, on or about the 23rd day of August, 1960, as well before as after said date, with force and arms, at and in the county aforesaid, in furtherance of the unlawful conspiracy set out

in the first count, unlawfully and willfully did violate the provisions of the General Statutes of North Carolina, Chapter 14, Section 353, in that the said Pierce Oliver Kidd Brewer, individually and as agent and employee of Pfaff & Kendall, a corporation, and as as agent and employee of Traffic and Street Sign Co., a corporation, the said Robert M. Burch, the said George Masefield, individually and as agent, employee and Division Sales Manager of Pfaff & Kendall, a corporation, the said Martin J. Hamilton, individually and as agent, employee, officer and Vice President of Pfaff & Kendall, a corporation, and as agent, employee, officer and Vice President of Traffic and Street Sign Co., a corporation, the said Walter Schoenfeldt, individually and as agent, employee, and General Manager of Traffic and Street Sign Co., a corporation, the said Pfaff & Kendall, a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd, Brewer, George Masefield, Martin J. Hamilton and others and the said Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, Martin J. Hamilton, Walter Schoenfeldt and others, in furtherance of the unlawful conspiracy set out in the first count, unlawfully and willfully did offer and promise money, gifts, gratuities and other things of value to Robert A. Burch, an agent and employee, to wit: the Traffic Engineer of the State Highway Commission, an agency of the State of North Carolina, with the intent and for the purpose of influencing the actions of the said Robert A. Burch in relation to his employer's business, i. e., to influence the said Robert A. Burch, who, as Traffic Engineer for the State Highway Commission, was responsible for and in charge of the writing of specifications and the drawing of plans for the procurement and erection of highway signs for the State Highway Commission, to write and have written and to draw and have drawn specifications and plans for the

procurement and erection of highway signs to be erected in Davie and Forsyth Counties and connection with Project 8.17415 and in Orange and Durham Counties in connection with Project 8.14573 and in Forsyth County in connection with Projects 8.17446 and 8.17474, in a manner so as to favor the products of Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, and the said Robert A. Burch, an agent and employee, to wit: the Traffic Engineer, of the State Highway Commission, an agency of the State of North Carolina, willfully and unlawfully, and in furtherance of the unlawful conspiracy set out in the first count, did accept the aforesaid offer and promise of money, gifts, gratuities and other things of value under an agreement and with the understanding that he would act in a particular manner in relation to his employer's business, i.e., that he, the said Robert A. Burch, would write and have written and draw and have drawn specifications and plans for the procurement and erection of highway signs to be erected in Davie and Forsyth Counties in connection with Project 8.17415 and in Orange and Durham Counties in connection with Project 8.14573 and in Forsyth County in connection with Projects 8.17446 and 8.17484, in a manner so as to favor the products of Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, and thereafter the said Robert A. Burch, an agent and employee, to wit: the Traffic Engineer, of the State Highway Commission, an agency of the State of North Carolina, in furtherance of the unlawful conspiracy set out in the first count, unlawfully and willfully and with the intent to favor the products of Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, wrote and had written and drew and had drawn specifications and plans for the procurement and erection of highway signs to be erected in Davie and Forsyth Counties in connection with Project 8.17415 and in Orange and Durham Counties in con-

nection with Project 8.14573 and in Forsyth County in connection with Projects 8.17446 and 8.17484, in a manner so as to favor the products of Pfaff & Kendall, a corporation, and Traffic and Street Sign Co., a corporation, and at various times thereafter, the said Pierce Oliver Kidd Brewer, individually and as agent and employee of Pfaff & Kendall, a corporation, and as agent and employee of Traffic and Street Sign Co., a corporation, the said Robert M. Burch, the said George Masefield, individually and as agent, employee and Division Sales Manager of Pfaff & Kendall, a corporation, the said Martin J. Hamilton, individually and as agent, employee, officer and Vice President of Pfaff & Kendall, a corporation, and as agent, employee, officer and Vice President of Traffic and Street Sign Co., a corporation, and said Walter Schoenfeldt, individually and as agent, employee, and General Manager of Traffic and Street Sign Co., a corporation, the said Pfaff & Kendall, a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, George Masefield, Martin J. Hamilton and others and the said Traffic and Street Sign Co., a corporation, acting through its officers, agents and employees, to wit: Pierce Oliver Kidd Brewer, Martin J. Hamilton, Walter Schoenfeldt and others, in furtherance of the unlawful conspiracy set out in the first count, unlawfully and wilfully and in a secret manner by covertly channeling funds and monies through Interstate Services, Inc., a corporation, Robert M. Burch and various other corporations and individuals did give to the said Robert A. Burch, an employee of the State Highway Commission, as aforesaid, money, gifts, gratuities and other things of value as had theretofore been promised to influence his action in relation to his employer's business, and the said Robert A. Burch, an employee of the State Highway Commission, as aforesaid, in furtherance of the conspiracy set out in the first count, did at various times, unlawfuly, and will-

fully and in a secret manner accept money, gifts, gratuities and other things of value as had theretofore been offered and promised him to influence his actions in relation to his employer's business against the form of the Statute in such case made and provided and against the peace and dignity of the State."

There is an obvious and substantial distinction between count one in the indictment and the other eleven counts in the indictment, in that the gist of the first count is the alleged conspiracy to violate G. S. 14-353 and not the acts done in pursuance thereof (State v. Christianbury, supra; Williamson v. United States, 207 U. S. 425, 447, 28 S. Ct. 163, 170, 171, 42 L. Ed. 278 290; Heike v. United States, 227 U. S. 131, 33 S. Ct. 226, 47 L. Ed: 450; United States v. Rabinowich, 238 U. S. 78, 35 S. Ct. 682, 59 L. Ed. 1211; Wharton's Criminal Law and Procedure, Anderson Ed., 1957, Vol. I, Conspiracy, section 87, where many cases from the states are cited in support of the text), and the gist of the eleven other counts is the alleged specific substantive acts done by the defendants in violation of G. S. 14-353 (Pinkerton v. United States, 328 U. S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489; Kelly v. United States, 6 Cir., 258 F. 392, certiorari denied 249 U. S. 616, 39 S. Ct. 391, 63 L. Ed 803). As stated above, in North Carolina "no overt act is necessary to complete the crime of conspiracy" (State v. Davenport, supra), and "the 'conspiracy' is the crime and not its execution" (State v. hiteside, supra). It is perfectly plain that two distinct offenses were alleged, and one may be convicted both of the substantive offenses which were the object of the conspiracy, and of the conspiracy, even though the substantive offenses were alleged as the overt acts necessary to convict for conspiracy. Pinkerton v. United States, 328 U. S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489.

In the Pinkerton case in the Supreme Court a single conspiracy was charged and proved. Some of the overt

acts charged in the conspiracy count were the same acts charged in the substantive counts. Each of the substantive offenses found was committed pursuant to the conspiracy. Petitioners therefore contend that the substantive counts became merged in the conspiracy count, and that only a single sentence not exceeding the maximum two-year penalty provided by the conspiracy statute could be imposed. To state the matter differently, the contended that each of the substantive counts became a separate conspiracy count but, since only a single conspiracy was charged and proved, only a single sentence for conspiracy could be imposed. The Court in rejecting their contention said:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. (Citing authority.) Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime. (Citing authority.) * * * But those exceptions are of limited character. The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. (Citing authority.) A conviction for the conspiracy may be had though the substantive offense was completed. (Citing authority.) And the plea of double jeopardy is no defense to a conviction for both offenses. (Citing authority.) A conspiracy is a partnership in crime. (Citing author-

ity.) It has ingredients, as well as implications, distinct from the completion of the unlawful project. As stated in United States v. Rabinowich, 238 U. S. 78, 88, 35 S. Ct. 682, 684, 685, 59 L. Ed. 1211, (1215), (42 Am. Bankr. Rep. 255):

"'For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.' (Citing authority.)

"Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in Sneed v. United States, supra, (CCA 5th) 298 F. 911, 912, p. 913, 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

This is said in Annotation 37 A.L.R. 778:

"The rule appears to be well settled in most jurisdictions that a conspiracy to commit a crime is not merged in the commission of the completed offense, but is a distinct offense of itself and punishable as such, notwithstanding its object, the attempted crime, has been accomplished." (A legion of cases is cited to support the text.) See also Annotation 75 A.L.R. 1411.

(15) Conspiracy alleged may fail in proof, as well as proven conspiracy may fail in execution. Failure, then, to prove the existence of a conspiracy alleged to have been formed to commit a particular character of crime cannot affect the right of the State, regardless of conspiracy, to prove that a crime of the same character was actually committed. This is well within settled rules of the doctrine of conspiracy. State v. McCullough, 244 N. C. 11, 92 S. E. 2d 389; Pinkerton v. United States, 328 U. S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489; Kelly v. United States, supra; 15 C.J.S. Conspiracy 90, p. 1135. The offense charged in the first count and the offenses charged in the other eleven counts in the indictment are not the same in law and in fact. Although the State failed to prove that Robert M. Burch was one of the conspirators and was guilty of the conspiracy alleged against him in count one in the indictment, he could still be convicted of the substantive offenses committed by him in violation of G. S. 14-353, as charged against him in counts two through twelve, both inclusive. The State failed to convict him on counts five, six and twelve, but did convict him on counts seven, eight, nine, ten and eleven.

The verdict of the jury against Robert M. Burch is not inconsistent. In the Kelly case two indictments were returned: One charging a conspiracy to defraud the United States, and the other charging the commission of acts of fraud, which was the object of the alleged conspiracy. The cases were consolidated for trial. Under the conspiracy indictment there was a verdict of not guilty. Under the second indictment, comprising nine counts, there was a verdict of guilty against each defendant. Sentences were pronounced, and they appealed. Defendants contended "that the conspiracy and overt acts alleged in the first indictment so far involved the frauds alleged in the second one as to require acquittal also under it, and hence that the findings and the verdict of the jury under the second indict-

ment are 'in fundamental and irreconcilable conflict with the findings and verdict of the jury' under the first one." The Court in rejecting the contention said:

"Certainly there was no inconsistency in alleging the offenses severally charged in the two indictments. Can it be, then, that failure of proof as respects the controlling issue under either indictment can operate to defeat both indictments? The verdict of not guilty under the first and that of guilty under the second naturally signify that conspiracy was not proved under the former, but that fraud was proved under the latter. This derives special emphasis from the rule, just pointed out, that an effective overt act may be committed by one or more less than the entire number of those entering into a conspiracy, and need not constitute the very crime that is the object of the conspiracy, and indeed need not be of itself a criminal act. It results that the offense of which defendants were found guilty was not the same offense as the one of which they were found not guilty. This, it is true, is but another way of stating, as we have already stated, that distinct offenses were charged in the two indictments.

"One of the grounds set up in the motion non obstante is that to support the charges of the second indictment, 800, the government 'relied mainly upon evidence concerning acts and facts which are specifically set out and described as overt acts' in the first indictment, 798. This was in effect a plea of autrefois acquit. Such a plea, however, is unavailing unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea; thus, as Mr. Justice Harlan said (Burton v. United States, 202 U. S. 344, 380, 26 Sup. Ct. 688, 698 (50 L. Ed. 1057, 6 Ann. Cas. 362), in adopting language of Chief Justice Shaw, it must appear that the offense charged 'was the same in law and in fact. The plea will

be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.' Some of the facts leading up to the application there made of this rule are helpful. The point was presented (202 U. S. 377, 26 Sup. Ct. 697, 50 L. Ed. 1057, 6 Ann. Cas. 362) whether defendant could 'legally be indicted for two separate offenses, one for agreeing to receive compensation in violation of the statute, and the other for receiving such compensation.' In sustaining the view that these were separate offenses Mr. Justice Harlan said (Id.):

" 'There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense; or compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated.' "

It is significant that defendant Robert M. Burch saw fit not to bring up on appeal the State's evidence of the substantive acts committed by him in violation of G. S. 14-353 in respect to counts seven, eight, nine, ten and eleven in the indictment, on which counts he was found guilty, and to contend that the State's evidence on those counts was insufficient to carry the case to the jury against him, or the charge of the court.

We have written at length, because, so far as we know, the constitutionality of statutes substantially similar to G. S. 14-353 has not been challenged, except in the New York case of People v. Davis. In '57 C.J.S. Master and Servant, 639, entitled "Bribing Servant with Intent to Influence His Relation with Master," it is said: "The validity of such statutes has been upheld * * *." In support of the text it cites one case, the New York case of People v. Davis, Sp. Sess., 160 N. Y. S. 769.

Incidentally, the statutes of the following States somewhat similar to our G. S. 14-353 do not contain language like the New York statute, "without the knowledge and consent of the principal, employer or master of such agent, employee or servant": Connecticut, Conn. Gen. Rev. Stat. 53-266; Massachusetts, Mass. Ann. Laws, ch. 271, 39; Michigan, Comp. Laws 1948, sec. 750.-125; Rhode Island, R. I. Gen. Laws Ann., secs. 11-7-3 and 11-7-4; South Carolina, S. C. Code, sec. 16-570; Washington, Wash. Rev. Code, secs. 49.44.060 and 49.44.070; and Wisconsin, Wis. Stat. Ann., sec. 134.05.

All the assignments of error by defendant Brewer, all the assignments of error by defendant Robert A. Burch, and all the assignments of error by defendant Robert M. Burch have been considered, and all and every one of them are overruled. All the judgments entered against defendant Brewer, all the judgments entered against defendant Robert A. Burch, and all the judgments entered against defendant Robert M. Burch are:

Affirmed.

Higgins, J., took no part in the consideration or decision of this case.

A True Copy
Teste:
Adrian J. Newton
Clerk, North Carolina Supreme Court:

APPENDIX B

SUPREME COURT OF NORTH CAROLINA

Fall Term 1962

No. 441—Wake

STATE OF NORTH CAROLINA

v.

PIERCE OLIVER KIDD BREWER, ROBERT A. BURCH, ROBERT M. BURCH, GEORGE MASEFIELD, MARTIN J. HAMILTON, WALTER SCHOENFELDT, PFAFF & KENDALL, a corporation, TRAFFIC AND STREET SIGN COMPANY, a corporation

Judgment

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable R. Hunt Parker, Justice, be certified to the said Superior Court to the intent that the judgment is affirmed as to all appellants.

And it is considered and adjudged further that the defendant Brewer and surety to the appeal bond, Mary Frances Linney Brewer, the defendant Robert A. Burch and sureties to the appeal bond, Elizabeth M. Burch and Woodrow A. Sears, and the defendant Robert M. Burch and sureties to the appeal bond, Robert A. Burch and Elizabeth M. Burch, do pay the costs of the appeal in this Court incurred, to wit, the sum of Seventy-Six and no/100 ($76.00) Dollars, and execution issue therefor.

Certified to Superior Court this ..... day of ....., 19.....

Adrian J. Newton
Clerk of the Supreme Court

A TRUE COPY

By /s/ SARAH B. HANNER
Sarah B. Hanner, Deputy Clerk

APPENDIX C

IN THE

SUPREME COURT OF NORTH CAROLINA

No. 441

STATE OF NORTH CAROLINA

v.

PIERCE OLIVER KIDD BREWER, ROBERT A. BURCH, ROBERT M. BURCH, GEORGE MASEFIELD, MARTIN J. HAMILTON, WALTER SCHOENFELDT, PFAFF & KENDALL, a corporation, TRAFFIC AND STREET SIGN COMPANY, a corporation

Notice of Appeal to the Supreme Court of the United States

I.

Notice is hereby given that Pierce Oliver Kidd Brewer, Robert A. Burch, and Robert M. Burch, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of North Carolina, entered and dated February 1, 1963, wherein the Supreme Court of North Carolina affirmed a judgment of conviction entered in the Superior Court of Wake County, North Carolina, on July 18, 1962. The opinion and judgment of the Supreme Court of North Carolina is reported at 258 N. C. 35; 129 S. E. 2d 262.

This appeal is taken pursuant to Title 28 U.S.C., Section 1257 (2), it being an appeal from a final judgment of the highest court of the State of North Carolina, upholding the constitutionality of a criminal statute against the appellants' contention that it is unconstitutional.

The appellants, defendants below, Pierce Oliver Kidd Brewer, Robert A. Burch, and Robert M. Burch, were convicted of a conspiracy to violate North Carolina General Statute 14-353, a penal statute of the State of North Caroline designed to make unlawful the influencing of agents and servants. The statute, in pertinent part, reads as follows:

"Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; . . . shall be guilty or a misdemeanor and shall be punished in the discretion of the court."

The appellants, Pierce Oliver Kidd Brewer and Robert A. Burch, were each sentenced to eighteen (18) months in the comomn jail of Wake County and assigned to work under the supervision of the North Carolina Prison Department. The appellant, Robert M. Burch, was sentenced to the common jail of Wake County for a period of twelve (12) months, sentence suspended on condition that he pay a fine of Two thousand five hundred dollars ($2,500.00) and the entire costs of court.

Each of the appellants, Pierce Oliver Kidd Brewer, Robert A. Burch, and Robert M. Burch, is enlarged on bail in the amount of Six thousand dollars ($6,000.00).

II.

The Clerk will please prepare a transcript of the record in the cause for transmission to the Supreme Court of the United States, and include in the said transcript the following:

1. The record of case on appeal filed with the Supreme Court of North Carolina.
2. A copy of General Statute 14-353.
3. The opinion and judgment of the Supreme Court of North Carolina entered on February 1, 1963.

4. The petition and order staying execution pending filing of notice of appeal to the Supreme Court of the United States.

5. The notice of appeal to the Supreme Court of the United States.

III.

The following questions are presented by this appeal:

1. Is North Carolina General Statute 14-353, as written, in violation of and repugnant to the United States Constitution, specifically Amendment XIV thereof, in that the statute fixes no immutable standard of guilt and is so vague, indefinite and uncertain as to amount to a denial of due process of law?

2. Is North Carolina General Statute 14-353 repugnant to the Due Process Clause of the Constitution of the United States in that the statute, as written, constitutes an arbitrary and capricious exercise of the police power of the State?

/s/ Pierce Oliver Kidd Bremer
Pierce Oliver Kidd Brewer, Appellant

/s/ Robert A. Burch
Robert A. Burch, Appellant

/s/ Robert M. Burch
Robert M. Burch, Appellant

Seawell and Harrell
Attorneys for Appellants
P. O. Box 2914
Raleigh, North Carolina

By: /s/ Bernard A. Harrell
Bernard A. Harrell

Bunn, Hatch, Little and Bunn
Attorneys for Appellants
Insurance Building
Raleigh, North Carolina

By: /s/ William T. Hatch
Wililam T. Hatch

PROOF OF SERVICE

I, Harry McGalliard, Assistant Attorney General of the State of North Carolina, hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, this 30th day of April, 1963.

/s/ Harry McGalliard
Assistant Attorney General

NO. 441 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1963

STATE OF NORTH CAROLINA

v.

PIERCE OLIVER KIDD BREWER, ROBERT A. BURCH, ROBERT M. BURCH, et als, Appellant

Petition to Stay Execution of Judgment

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina:

Now comes Pierce Oliver Kidd Brewer, Robert A. Burch, and Robert M. Burch, the appellants in the above entitled cause, and through their respective counsel, Seawell and Harrell, and Bunn, Hatch, Little and Bunn, respectfully move the Court to stay execution of the judgment rendered

in the July Extended 1962 Criminal Term of Superior Court of Wake County entered on July 18, 1962, by Honorable Raymond B. Mallard, Judge Presiding, which judgment, upon appeal by appellants to the Supreme Court of North Carolina, was affirmed as to all appellants by the Court in its opinion and decision rendered on 1 February 1963.

Your petitioners, by and through their counsel, respectfully show unto the Court that they intend to give notice of appeal to the Supreme Court of the United States in accordance with Title 28, U.S.C.A., Section 1257(2), and Rules 10 and 11(1) of the Supreme Court of the United States. The petition is filed in good faith for the purpose and to the end that an appeal may be made to the Supreme Court of the United States.

Wherefore, your petitioners, by and through their counsel, respectfully pray that an order issue staying execution of judgment pending the giving of such notice of appeal, and that the bonds for appearance now in the hands of the Clerk of the Supreme Court of North Carolina be continued to bind the appearance of the petitioners to the term of Superior Court of Wake County next ensuing the final decision of the Supreme Court of the United States or to bind the appearance of your petitioners in the event they fail to prosecute their appeal to the Supreme Court of the United States.

This the 4th day of February, 1963.

SEAWELL AND HARRELL

By: /s/ BERNARD A. HARRELL
Attorneys for
Pierce Oliver Kidd Brewer

BUNN, HATCH, LITTLE AND BUNN

By: /s/ WM. T. HATCH
Attorneys for Robert A. and
Robert M. Burch

I, Harry McGalliard, Assistant Attorney General of the State of North Carolina, hereby acknowledge receipt of a copy of the foregoing petition for stay of execution in the case of State of North Carolina v. Pierce Oliver Kidd Brewer, et al, No. 441, Spring Term 1963, this the 4th day of February, 1963.

/s/ HARRY MCGALLIARD
Assistant Attorney General

APPENDIX D

NO. 441 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1963

STATE OF NORTH CAROLINA

v.

PIERCE OLIVER KIDD BREWER, ROBERT A. BURCH, ROBERT M. BURCH, et als, Appellant

Order Staying Execution and Fixing Bond

The appellants, Pierce Oliver Kidd Brewer, Robert A. Burch, and Robert M. Burch, having filed petition for stay of execution of the judgment rendered by the Judge Presiding at the July 1962 Extended Criminal Term of Wake County Superior Court, which judgment upon appeal was affirmed by the Supreme Court of North Carolina by an opinion and decision rendered 1 February 1963, and the appellants, Pierce Oliver Kidd Brewer, Robert A. Burch, and Robert M. Burch, having stated their intention to file notice of appeal to the Supreme Court of the United States, and the Court having considered such petition, it is now therefore;

Ordered that the judgment rendered at the July 1962 Extended Criminal Term of Wake County Superior Court, which judgment upon appeal was affirmed by this Court in an opinion and decision dated 1 February 1963, be and the same is hereby stayed for a period not to exceed ninety (90) days from 1 February 1963;

It is further ordered that the appearance bond which the appellants have filed with the Clerk of the Supreme Court of North Carolina be continued to bind the appearance of the said appellants to appear in the term of Superior Court of Wake County next ensuing a final decision of the Supreme Court of the United States in the

event the judgment should be found affirmed, or to bind the appearance of Pierce Oliver Kidd Brewer, Robert A. Burch, and Robert M. Burch to the next term of Wake County Superior Court in the event they should fail to prosecute their appeal to the Supreme Court of the United States.

This the 4th day of February 1963.

/s/ E. B. Denny
Chief Justice of the Supreme Court
of North Carolina

APPENDIX E

North Carolina General Statute 14-353

§ 14-353. *Influencing agents and servants in violating duties owed employers.*—Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies, or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1913, c. 190, s. 1; C. S., s. 4475.)

APPENDIX F

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

PIERCE OLIVER KIDD BREWER, ROBERT A. BURCH, ROBERT M. BURCH, GEORGE MASEFILD, MARTIN J. HAMILTON, WALTER SCHOENFELDT, PFAFF & KENDALL, a corporation, TRAFFIC AND STREET SIGN COMPANY, a corporation

Motion for Extension of Time to Docket Case and File Records

TO THE HONORABLE EMERY B. DENNY, CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA:

Now comes Malcolm B. Seawell, Bernard A. Harrell and William T. Hatch, Attorneys for the appellants, Pierce Oliver Kidd Brewer, Robert A. Burch and Robert M. Burch, and respectfully move his Honor, under Rule 13 of the Rules of the United States Supreme Court, for an extension of fourteen (14) days from June 29, 1963, when the appellants are due to docket the case and file the record in the Supreme Court of the United States.

For cause for extension, the undersigned respectfully show unto the Court that since the notice of appeal has been given in this case the law firm of Seawell and Harrell has moved its offices and has formed a new partnership under the name of Seawell, Harell and Churchill, and such move has caused a substantial delay in preparation of the record.

Wherefore, the undersigned respectfully move the Court to extend the time for filing and docketing of the case until July 13, 1963.

Respectfully submitted this 25th day of June, 1963.

/s/ MALCOLM B. SEAWELL
Malcolm B. Seawell

/s/ BERNARD A. HARRELL
Bernard A. Harrell

/s/ WILLIAM T. HATCH
William T. Hatch

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

PIERCE OLIVER KIDD BREWER, ROBERT A. BURCH, ROBERT M. BURCH, GEORGE MASEFILD, MARTIN J. HAMILTON, WALTER SCHOENFELDT, PFAFF & KENDALL, a corporation, TRAFFIC AND STREET SIGN COMPANY, a corporation

Order

This cause coming on to be heard, it being a motion by the attorneys for the appellants for an extension of time in which to docket the case and file the record in the Supreme Court of the United States, pursuant to Rule 13 of the Rules of the United States Supreme Court, and the attorneys for appellants having shown unto the Court a good cause why an extension is needed, it is now, therefore, ordered that the appellants are allowed until July 20, 1963, in which to docket the case and file the record in the Supreme Court of the United States.

This the 25th day of June, 1963.

/s/ EMERY B. DENNY
Emery B. Denny, Chief Justice of
the Supreme Court of North Carolina